



Media Freedom and Pluralism

Media Policy Challenges in the Enlarged Europe

Edited by
Beata
Klimkiewicz



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MEDIA FREEDOM AND PLURALISM

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in the Enlarged Europe*

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Beata Klimkiewicz



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INTRODUCTION

Harmonizing European Media Policy: *Supranational Regulatory Trends and National Responses*

BEATA KLIMKIEWICZ

Media policy in Europe faces a twofold challenge. On the one hand, new technologies and media services such as digital television, satellite radio, mobile content applications, video on demand, and new Internet services are fundamentally transforming media environments and media use. On the other hand, the historical enlargement integrating the countries of Eastern and Central Europe within the EU's political, economic, and legal structures implies fundamental geopolitical and cultural change, both at the European level and in the region. These new conditions in the making can be approached in one of three ways: either through a chronological description of different consecutive stages (a historical approach); through a case-by-case description of different national or country experiences (a geographical approach), or through an analytical approach aiming at conceptualizing main problem areas and open questions in European media policy today. As can be surmised from the table of contents, the authors of this volume followed the third route.

This choice, however, does not eliminate time and space considerations at the expense of a problem-oriented focus. Differentiation and delineation of problem areas is deeply rooted in an emerging logic of media policy, which requires a new type of complexity. In other words, national borders still matter, but so do sub-national (regional), supranational and global constellations. A new complexity thus depends on switching between different spatial, cultural, and political levels and constant redefinition of their institutional settings and fields of competencies.

The dynamics of globalization bring in a systemic change of media markets, including an intensifying pressure for media ownership concentration and new forms of alliances cutting across traditionally

divided media sectors; audience fragmentation; syndication of media content and services; and new relations between different actors of media systems, such as platform providers and content makers. New forms of media use and modes of social interactions with the media redesign everyday social activities and change the character of social institutions (Schulz, 2004).

Both globalization and convergence reshape the logic of media policymaking and challenge traditional regulatory models. The conceptualization of problems to be dealt with by regulators, the processes by which regulatory decisions are made, and the operationalization of regulatory rationales are all in a state of flux, both at the European and national levels. The complexity and interpretational richness of such media policy issues as media competition, cultural diversity, access and use, public interest, media accountability, media pluralism, democratic participation, and the role of the media in a larger society are subject to ambiguity and constant redefinition.

At the same time, continuous integration of media regulatory functions of the nation-state into the European Union, as well as adaptation and incorporation of European decisions and strategies into domestic policy discourse and practice, have had significant implications for the legal and regulatory systems concerning the media. The historical fifth and sixth EU-enlargement waves eastward generated institutional change both at the EU macro-level and the level of Eastern and Central European media regulatory institutions and regimes (especially in terms of opening media markets for EU ownership, promotion of EU audiovisual content and services, control of state aid provided to public service media and telecom industry, and privatization of the communications sector). A constant adoption of EU media policy and the Council of Europe's standards affected various facets of those media systems that underwent post-communist reform.

The present collection of essays seeks to systematize recent major policy developments related to two main pan-European institutions—the European Union and the Council of Europe, through the perspective of new EU Member States. The analytical problem-related approach seems to better reflect a media policy process as an interrelated part of European integration, formation of European citizenship, and exercise of communication rights within the European communicative space. The question of normative expectations is to be compared in

this case with media policy rationales, mechanisms of implementation (transposing rules from EU to national levels), and outcomes.

A familiar historical narrative describing the imitation of Western media policy models (the “accidental” phenomenon of globalization), and then the incorporation of EU media order (counteracting with globalization) by Central European countries, does not seem to fully explain two circumstances. The first one is varied national approaches towards fundamental media policy rationales—media freedom and diversity. The second circumstance is significant structural and regulatory commonalities that set Central European post-communist countries apart from older EU Member States. This volume aims to re-address these questions critically and identify major contentious issues in the debate over harmonization of European media policy.

Media regulation has traditionally been divided between content-related aspects (such as a ban on hate speech; promotion of national, local, and European works; and protection of minors) and structural aspects (such as rules on media ownership, PSM, community media, and subsidies for local media). The present book tests proportions between these two regulatory dimensions and brings together leading scholars in their respective fields, most of whom co-operated on this research theme under the scheme of COST Action A30 “East of West: Setting a New Central and Eastern European Research Agenda” (2005–2009)—Working Group 3 Media Policy and Regulation. The vast majority of the book’s authors come from the region, although the perspective goes beyond Central and Eastern Europe.

Three patterns

The European dimension of the current media policy process is well reflected in the scholarly literature, which offers numerous approaches to explain parameters of media policy thinking, language, and practice, especially within a strong context of governance at the pan-European level. These mirror the fundamental divide between the belief in efficiency of market forces or deregulation to create a free and diverse media environment, versus the belief that regulation is needed in order for social, cultural and democratic needs to be met and communication rights to be fully exercised (Humphreys, 2008; Einstein, 2004;

Ward, 2002). The process of harmonization, increasingly supporting the national level of media policymaking, has formed different patterns through which a set of interrelated decisions taken by an institutional actor (CEC, EP, CoE) or group of actors achieves its coherence and resonance with media policy rationales.

The *networked* pattern of harmonization refers to a structure of policy formation and decision-making, in which pan-European institutions, states, societal organizations, and interest groups are vertically and horizontally disaggregated but linked together by co-operative exchange (as in corporatism) (Borzel, 1997; Ansell, 2000). The logic of policymaking results in bringing together unique configurations of actors around specific projects oriented towards institutional solutions (Grande, 2001). Policy attunement is distributed over various territorial levels (regional, national, pan-European) and over various functional arenas (e.g. competition, audiovisual policy, human rights). European media policy is thus formed by a relatively large number of formally independent but functionally interdependent actors and institutions (such as states, EU institutions—the EC and EP in particular—CoE, media industry consortia, and various interest groups), while policy-making processes might be reflected in a convergence of networks operating simultaneously in multiple functional arenas and at multiple geographic scales (Ansell, 2000, p. 322). The overlapping of EU and CoE activities is especially relevant in this context.

The *asymmetry* pattern stresses imbalance between pro-market deregulatory “negative integration” and market-correcting regulatory and “positive integration.” Fritz Scharpf (1999, p. 45) argues that “negative integration” refers to the removal of barriers to free and undistorted competition. “Positive integration,” on the other hand, concerns reconstitution of an economic system of regulation through market-correcting measures. Scharpf emphasizes the structural asymmetry of EU governance, gravitating toward “negative integration,” while “positive integration” has contributed little to the increase of institutional capacity and problem-solving (Scharpf, 1999, p. 157). This regulatory asymmetry has been repeatedly echoed by other scholars when analyzing EU or European media policies. Alison Harcourt (2005) has stressed the essentially market-making, “deregulatory” nature of EU media policies. Venturelli (1998) has underlined the absence of legislative clarification on positive information rights as political rights and the dominance of

negative free-speech rights justifying deregulatory and liberalizing policies in the media sphere, which contrast with mechanisms for supporting media production (European quota). Dennis McQuail and Jan van Cuilenburg (2003) see normative grounds for deregulatory asymmetry in a new communications policy paradigm mainly driven by an economic and technological logic. This media policy shift legitimizes retreat from regulation where it interferes with market development or technological objectives, and it prioritizes economic and technological over social-cultural and political welfare when priorities have to be set.

The *bargaining* pattern reflects changes in the distribution of power between public European institutions and private actors in favor of the former as a result of joint media policymaking. Despite the limited regulatory competence of the EU and other supra-national institutions in the field of media policy, European public actors (EU institutions, CoE) have had opportunities to use purposefully various “internal” ties and commitments generated by joint decision-making to strengthen their bargaining position vis-à-vis “external” e.g. private actors (Grande, 2001, p. 19). In the case of AVMS Directive drafting, the European Commission has compensated for its limited autonomy in relation to the integrated system of joint decision-making (the Council, EP, Member States) by gains in autonomy vis-à-vis interest groups (e.g. media industry), especially in terms of protective measures (European quota, protection of minors and human dignity).

Not surprisingly, and given the enormous complexity of policy environment shaping technological conditions, traditional and new media performance, as well as the institutional setting of media regulatory bodies, outcomes of European media policy have been marked by all three patterns. Most scholars, however, conclude that European media policy has been most influenced by the “asymmetric” EU approach to communication, which reflects the polity’s construction: It is closer to neoliberalism than the European social welfare model (Harcourt, 2005; Harrison and Woods, 2007; Sarikakis, 2008). The European policy environment has naturally been institutionally and geographically broader than the EU, but the gravitation towards EU priorities proved to define a policy direction, especially in new Central and East European Member States, which have transposed the *acquis communautaire* and institutional mechanisms during the last two accession waves. On the whole, the logic of media policymaking in Europe responds to

radical technological change fundamentally redefining media institutions, patterns of media use and regulatory models, traditionally locked in functional, sectoral, institutional, and national boundaries.

Media policy trends

Current media policy trends integrating policy developments at the European level with regulatory and structural specificities at the national level may be characterized by the following aspects:

1. *Different standards of rationality*—Problematization of issues within the process of media policymaking stems not only from different (conflicting) interests seeking diverse solutions within a framework of the same rationales. It is also grounded in different standards of rationality, proposing divergent choices, each of which may be perfectly rational given the different logic and methods of reality conceptualization (Staniszakis, 2004, p. 19). Herein, both market-oriented deregulatory and social- and cultural-oriented regulatory rationales may be addressed by diverse (even contradictory) measures and may have a dissimilar weight when promoted by different actors. This of course enhances the complexity of current media policy formation and implies interpretational richness and constant redefinition, and thus also the ambiguity of the language used.
2. *Institutional interdependence*—The organizational framework for European media policy formation and implementation is characterized by a high degree of institutional interdependence. A dense network of institutional ties generates interactions, which have both negative outcomes (administrative competition, policy deadlock) and positive outcomes (policy diffusion, policy learning, parametric adjustment) (Grande, 2001, p. 10). Technological convergence and the complexity of current media policy urges the creation of new regulatory bodies at the national level, which share, and in some cases duplicate, competencies with traditional regulators.

3. *Complementarity*—Measures and means of policy implementation (mainly embodied in media and communication laws, regulatory mechanisms, self-regulation, or media performance) are increasingly designed in a complementary manner. This process involves various public policy actors (although not at equal stances), such as the EU institutions, national media regulatory agencies, government ministries, professional and media industry institutions, and NGOs.
4. *Functional convergence*—Functional convergence is largely driven by new technological environment, but also the process of policy attunement: The objects of policy analysis and regulation become accepted as common in various public spheres (Sarikakis, 2008). Multiple media and communication services regulated by different sectoral policy in past, are more increasingly dealt with in a common “information society/communication and media” umbrella framework. Policy attunement reaches different levels of governance: regional, national, supra-national.
5. *Challenge of democratic legitimacy*—The high complexity and constant redefinition of European media policy against technological changes and economic determinants causes a serious risk to transparency in a policymaking process. Not only is civic participation and democratic control limited in a multilateral, source- and knowledge-demanding negotiating process, but voices critical of the current state of policy proposals are also marginalized (Freedman, 2008), and process and space for civic participation are lacking (Kaitatzi-Whitlock, 2005). On the one hand, current social systems demand great trust; on the other hand, technocratic and industry-oriented policymaking process limits civic participation.

Structure of the book

The book explores three problem areas that emerge from current policy and regulatory developments in Europe:

- freedom of expression as a regulatory rationale is being reaffirmed within its growing recognition as a positive right (the citizen's right to be fully and impartially informed), at the same time the full exercise of this right, and communication rights more generally, need a new democratic regulatory framework to be set up at the European level;
- two principal media regulatory instruments at the European level—the TVWF Directive (now AVMS Directive) and the European Convention on Transfrontier Television—have recently undergone far-reaching modernization, extending regulation to new media services;
- media pluralism remains an important value and objective of European media policy, but there has been a lack of consensus and will to apply a harmonized regulatory mechanism to protect media diversity at the EU level.

These issues can be approached in a number of ways, and the book provides a place for exploring them one by one. Focusing on media policy rationales and models, the first section sets a conceptual framework for the whole volume. In the first chapter, Hannu Nieminen argues that the commercial logic followed in the European media and communication regulatory policies clashes with the aim of opening up and strengthening the European public sphere. Nieminen calls for a redefinition of the basis of the EU media and communication policies and establishing a democratic regulatory framework built on the concept of citizens' communication rights. Such a consistent all-European policy model would help the public sphere coalesce. Nieminen believes that ideas of deliberative democracy are not only theoretical but can also be applied in more policy-oriented ways. The new democratic regulatory framework is to be developed through a systematic approach, based on a value-chain model of analysis of media production. Crucial decisions affecting the media performance outcomes are made in all preceding stages of the media production process. These have to be examined against their resonance with democratic communication rights—namely, rights to information, to orientation, to social and cultural communality, and to self-expression.

Miyase Christensen provides an overview of European information society policies leaning, according to her, toward regulation favoring

the interests of businesses and markets over publics and citizens. Christensen emphasizes, that especially the European Commission's approach to questions of media pluralism and freedom of expression in the field of information society, is marked more by caution than vigor. Creation of "a single European information space" is stimulated by market-oriented mechanisms, while convergence between media/communications policies and competition policies motivates national governments to prioritize the latter rather than safeguard a public interest approach to the former. Christensen warns against the hope that the multiplicity of actors will amount to diversity and plurality of voices, as it can become a negative attribute of media freedom and pluralism. In the EU, the coexistence of a competitive single market *with* public interest concerns and priorities calls not only for an effective convergence of technological infrastructures and regulatory policies, but also for a convergence of minds across the region around common normative grounds.

Halliki Harro-Loit paints a media policy paradigm shift from a media literacy perspective. She points out that the modern information environment requires different communicative competences from media users linked to the individual's ability to seek, choose, process, analyze, and evaluate information he or she needs. Harro-Loit incorporates van Cuilenburg and MacQuail's (2003) integrated communications policy model into a new model of her own, enriched by educational domain and placing a citizen into its central position. Harro-Loit observes that the necessary policy tools and strategies for integrating communications policy and education policy are at place at the EU level, but implementation requires better attunement and thus synergy-building with national institutions. The task of the integrated policy model is to recognize factors and players in different domains that support each other.

The second section of the book focuses on content and service-related regulation. The main rationale behind the far-reaching modernization of the AVMS Directive was the harmonization and simplification of rules applicable to "traditional" (linear) television broadcasting and introducing part of the rules applicable to non-linear services. The most salient questions raised by the debate on the changing regulatory model (from regulation of TV broadcasting to regulation of audiovisual media services) revolve around dilemmas and controversies of *ex*

ante regulation, regulation of services and content on the Internet, national implementation of the European quota, and child- and human-dignity-protection rules. The authors in this section demonstrate polarized arguments about content and service-related regulation across different platforms and critically evaluate current policy outcomes in this area.

In the fourth chapter, Éva Simon examines how the Audiovisual Media Services Directive handles new technological innovations. In particular, she is sensitive to challenges of implementation and specificity of conditions in East and Central European media markets. Simon warns of overregulation stemming from a variety of collective goals (such as political pluralism, the need to improve the quality of democratic life, and only secondarily a private business) expected to be performed by media institutions. She highlights difficulties with *ex ante* regulation that can easily become an obstacle to development, since it tries to regulate unknown or rapidly changing phenomena. Well-established *ex ante* regulation, according to Simon, is possible only in a very limited sphere, as it should create a clear, transparent, and unambiguous situation. But even key terms in the AVMS Directive are open to multiple interpretations: Differences between linear, on-demand, and information society services are not clear, and might never be in fast-changing new media environments. Éva Simon's work also points to specificities of Central and East European media landscapes, which will affect implementation of the AVMS Directive. Thus the potential of non-linear services to replace linear services is smaller in the Central and East European countries, as new Member States are remarkably backward in broadband Internet usage compared to Western EU counterparts. The Directive also encourages the use of co-regulation and self-regulation, but these mechanisms have been far less developed in new East European Member States.

Péter Molnár suggests a radical critique of content and service-related regulation contradicting, in his view, the fundamental principle of freedom of speech. A key argument put forward by Molnár is that the risks of abuse-content and service-related regulation are higher than the benefits and cannot be balanced by justifications of protecting "core societal values." Moreover, content regulation can constrain freedom of speech, especially in less developed democracies. Péter Molnár is an enthusiastic believer in the potential of free exchange of

unregulated content. He considers the extension of the scope of the EU's Television without Frontiers Directive into the Audiovisual Media Services (AVMS) Directive unnecessary and insufficiently supported by general or media-specific justifications. Molnár's views are strongly inspired by American tradition and trans-Atlantic debate. He notices some historical commonalities between the United States and Hungary and parallels U.S. constitutional practice with the Hungarian case.

In a different vein, Andrej Škol kay explores developments and abuses of freedom of expression in the blogosphere, thus identifying new regulatory challenges to public communication. Škol kay argues that, in particular, the area of anonymous communication and commentaries should be subject to some form of regulation, preferably self-regulation. Škol kay describes serious problem areas on the rise: violence promoted by words, ethnic and religious hate speech on the Internet, promotion of pathological passions, and infringement of personal honor and dignity, as well as the low quality of public discourse. These have already prompted the design of some self-regulatory mechanisms and different national policy responses, but Škol kay sees little chance that this truly borderless communication will be regulated at the EU or international regulatory level.

Václav Štetka offers a critical account of European quota policy, once backed by a normative goal of stimulating the role of the media as agents of integration by content-related regulation (especially protection of European works) and several grant programs. Štetka argues that the rhetoric of European audiovisual policy has moved away from concentrating on the role of broadcasting media in representing shared European culture and nurturing common European identity, towards emphasizing their importance for preserving the unique character of various European cultures and thereby for promoting European "cultural diversity." Štetka observes that the modernized AVMS Directive builds upon the very same principles as its predecessor (TVWF Directive) in the area of "cultural provisions," largely allowing the conceptualization of cultural diversity in national terms and retreating from attempts to challenge the national viewing habits. Likewise, neither directives ensure that the national television audiences across Europe will have more opportunities to confront their own lifestyles and collective imageries—portrayed on their screens—with those from their fellow

European countries. Štetka empirically demonstrates the lack of “true diversity” (in country of origin as well as content) on television channels operating in the Czech TV landscape. He shows that in recent years, audiovisual content has been dominated by nationally oriented programming (even if it contains a significant share of local versions of various global TV formats), while the non-national European programming has been more or less silenced.

In the seventh chapter, Lilia Raycheva pays attention to a relatively neglected issue in media policy scholarship—protection of minors. Raycheva examines current policy and regulatory developments in this area, focusing in particular on harmful and inappropriate TV content. At the European level, she compares the policy frameworks of the Council of Europe and the European Union, analyzing legally non-binding recommendations as well as two principal legal instruments: the ECTT and the AVMS Directive. Raycheva examines specific regulatory practices in the case of Bulgaria and its media regulatory agency, the Bulgarian Council for Electronic Media. The current restructuring of media services is one of the key factors contributing to many challenges and unresolved regulatory dilemmas concerning the protection of children. Raycheva points out that the main deficiencies in this regard generally show through in the lack of technical means for program filtering; programs for special-needs children; programs for children at risk; access of children to the media; quality children’s programs; and media pedagogy. Raycheva advocates a regulatory balance that can be reached by establishing effective rules for conscious use of the media by parents and children and teaching children sustainable values, which will block out any attempt at encroachment on their psychological and physical health.

The third section of the book is devoted to structural regulation, media pluralism, concentration of media ownership, and external diversity of services. The concepts of media pluralism and diversity enjoy widespread recognition for their values reinforcing and facilitating democratic and participatory communication. The continuing trend towards concentration and multimedia linkups, resulting in the recycling of content and services, has become a concern for the European Parliament, which has repeatedly addressed the issue since the beginning of the 1980s. The Council of Europe has also played a crucial role in setting up common standards on media pluralism, principally

through a vast number of resolutions and recommendations adopted by the Parliamentary Assembly and the Committee of Ministers, as well as reports prepared by its advisory bodies and committees of experts. Repeated efforts of the European Commission to design harmonized regulatory mechanisms at the European level have, however, met difficulties of fragmented and irreconcilable interests, national preferences, and lack of consensus between the various parties involved. Recently the European Commission reoriented its regulatory focus towards a softer monitoring instrument (described in a staff working document, *Media Pluralism in the Member States of the European Union*). A more sophisticated risk-based monitoring mechanism, including such areas as policies and legal instruments that support pluralism in Member States, the range of media available to citizens in different Member States, and supply-side indicators on the economics of the media, will generate necessary assessment and data that could be used for more substantial policy change and the initiation of new solutions. The authors of the chapters in this section scrutinize issues that cut across the institutional dimension of structural regulation (e.g. the special status of public service media, functions of commercial television, and the role of community media) as well as measurement and normative considerations.

Péter Bajomi-Lázár argues that broadcasting regulation in Europe, as a general rule, gives primacy to public service broadcasting; even the regulation of commercial television is rooted in a normative perspective that is based upon the public service broadcasting ethos. According to Bajomi-Lázár, the fact that some researchers approach commercial broadcasters from the public service broadcasting ethos (that is, they are expected to deliver morality, good taste, and knowledge to the homes of viewers), rather than analyzing them on their own terms, may seriously hinder the understanding of how they operate and, consequently, their functions in social communications. Bajomi-Lázár contrasts ancient media with “neomedia,” offering not a one-way and downward flow of information but two-way and interactive communication that provides those “down” with the opportunity to take positions of resistance, participation, and control. In this vein, Bajomi-Lázár rejects arguments for the restrictive regulation of commercial television, particularly instruments placing public service tasks upon commercial media outlets.

Karol Jakubowicz explores the new functions and conceptualization of public service media in information societies. Several models of the emergence of public service broadcasting are sketched in this respect to demonstrate the growing association of public service media with democracy and civil society. Jakubowicz shares concerns about the skepticism of various actors concerning the future prospects of public service media in a new and rapidly growing media environment, where rationales for maintaining PSM are increasingly questioned. Jakubowicz argues that ideology will probably most strongly affect future chances of PSM survival, or public service provision via the electronic media. This is because the political will to advance the public interest in social life via PSM performance depends primarily on the ideological orientation of policymakers. Jakubowicz calls for a reconstruction of PSM into a platform for open societal communication signaling a radical departure from the traditional model of paternalistic top-down communication. After all, it is up to public service media themselves to understand how much the public interest and the needs of citizens have changed over time, and to reinvent themselves to serve new expectations and needs.

Mihály Gálík focuses on the changes in regulatory processes over the last ten to fifteen years and summarizes the conflicting concepts and interests in efforts to regulate media concentration at a common European level. Although, according to Gálík, the need for common regulation on media concentration is not questioned openly in the European Union, direct sector-specific regulatory tools are not applied at the Community level. At the same time, because media goods and services are as much cultural/political goods as they are economic goods, it makes sense to differentiate between conceptualizing, and thus also regulating, concentration in the media economic market, and concentration in the political and/or cultural market (in the “marketplace of ideas”). Gálík sees “a real need” to abandon the methods applied in regulating media concentration in the past, but he also observes that Member States are reluctant to give up their own regulatory power on media concentration for political reasons. Moreover, despite declarations on the vital importance of public service broadcasting in preserving media pluralism, EU and CoE Member States alike seem to have retained their present regulatory powers in this field, too.

Gianpietro Mazzoleni and Fausto Colombo’s chapter explores the multidimensional prospects of the governance shaping a European

audiovisual landscape. The authors are critical of the EU “free-market model” policies that regard the medium only in economic and technological terms. Such regulation fails to understand the media as an integral part of a complex system framed not only by technological and economic, but also cultural and institutional regulatory dimensions. Mazzoleni and Colombo advocate the balance of a system guaranteed by regulated competition, based on the one hand on the public control of universal access to and service of infrastructures, and on the other, on the existing anti-trust and freedom-of-information laws and norms. The authors are convinced that repeated policy discussions generated a widely shared agreement in favor of a Europe-wide harmonization of the normative framework that would support the infrastructure and media content strengthening the European culture without obstructing the development of local cultures.

Zrinjka Peruško closely examines the ample body of research and policy-oriented studies testing an evidence of the relationship between concentration of media ownership and diversity of media content. Peruško argues that the relationship itself should be thought as multi-leveled and complex, with many more gray areas in systematic research than clearly defined ones. Two options are considered for possible research trajectories: To examine whether media concentration causes diminished diversity and pluralism of media output (causal relationship), and to see whether media concentration and low diversity and pluralism in media content occur at the same time and in the same market (correlation). Neither of these, however, would bring deep understanding to a problem that should be perceived as a process and not limited to a given point in time. Instead, Peruško proposes to develop a metrics approach that would demonstrate trends and developments in the market shape and analyze the level and type of content diversity over time. Such an approach should be backed by a policy rationale of continued quality in media programs, defined as pluralism, diversity, and public interest content, and should be constantly promoted and assured by European and national media policies.

Kate Coyer and Arne Hintz scrutinize an unbreakable link that has been established between community media as institutions and an important element of media landscapes, and communicative rights, including the ability to create one’s own media independent of government or commercial pressures. As such, community media provide

necessary functions, bolstering media pluralism and structural diversity. Coyer and Hintz observe that the European policy agenda increasingly recognizes the role of these media. The Council of Europe and the European Parliament, in particular, initiated debates on how to develop enabling regulatory frameworks. However, the policy environment for community media in Europe remains sketchy and inconsistent. Although some countries have developed promising regulations as well as a sophisticated understanding of the policy needs for sustainable community media, others continue to disregard community media's very existence. Coyer and Hintz assert that, for a truly pluralistic media environment to flourish, debates over the future of the dramatically changing media environment must include the needs and interests of local communities and small-scale, not-for-profit media. Moreover, community media deserve recognition in law as a distinct type of media. They should thus be supported and encouraged through specific licensing arrangements that guarantee access to the spectrum and different platforms of distribution, as well as to economic resources that can foster sustainability.

Taken together, the perspectives and arguments presented in this volume paint a diverse picture of regulatory challenges connected to the fast-changing media environment in the enlarged Europe. Despite this diversity, common concerns can be identified: The key argument emerging from reflections on supra-national and national regulatory approaches seems to be for more recognition of the democratic nature of communication rights. Highly complex media policy patterns and trends of functional convergence, institutional interdependence, and complementarity, combined with a restrictive mandate of EU institutions based on the EC Treaty (Ward, 2008), have conditioned relatively asymmetric policy in media and communication. Nevertheless, a challenge of democratic legitimacy and the need to guarantee functions performed by media in democratic systems justifies a sound media policy balance. This is especially true when seen from the perspective of relatively young, and thus also more vulnerable, democracies.

CHAPTER 1

Towards Democratic Regulation of European Media and Communication

HANNU NIEMINEN

Since the mid-1990s the media and communication landscape in Europe has experienced profound changes. Previously, the traditional commercial logic of the print media was contrasted with other functional logics, such as the universal service principle of telephony and the public service principle of broadcasting. As a result of the digitalization and computerization of information, the situation has dramatically changed. Today, different regulatory regimes are converging. Commercial logic, promoting a neo-liberal regulatory framework, now appears to be victorious (see, e.g. Kaitatzi-Whitlock, 2005).

At the same time the ambitious project of European integration started after World War II appears to have run into a state of bewilderment. Even the European Union itself, in its own documents, speaks of its legitimacy crisis. One of the proposed remedies is the improvement of European media and communication policies and the development of the European public sphere. It is hoped that increasing public input and ways for citizens to participate in public debate in European issues will translate into support for the EU and the European integration process.

The basic argument in this paper is that the commercial logic followed in the European media and communication regulatory policies contradicts the aim of opening up and strengthening the European public sphere. The basis of the EU media and communication policies should be redefined, and for this purpose an approach to European media and communications regulation is proposed that is based on the concept of citizens' communication rights. It is normative in character and is grounded on the belief that ideas of deliberative democracy are not only theoretical but can also be applied in more policy-oriented ways. Initially, this approach is called a proposal for a democratic regulatory framework for European media and communication.

The arguments are developed in three stages. First, the twofold crisis of the European Union—in both politics and legitimacy—will be briefly explored. Second, the ways that the European Commission tries to use the media and communication policies to solve the crisis are discussed, including the Commission's attempts to employ the notion of the European public sphere. Third, and as the main outcome, a proposal for a new democratic regulatory framework for European media and communication will be outlined.

1.1. The twofold crisis of the European Union

To start, it might be good to clarify the basic normative engagements behind this chapter. The basic question is, why does Europe matter, or why should it matter? The answer is simply that there are an increasing number of issues that concern all of us living in Europe. Although the problems concerning environment, energy, security, and immigration are not exclusively European in character, their global solution depends greatly on what we Europeans decide to do about them. From this follows that, although the European Union is not the same as Europe, the EU nevertheless influences our lives in a major way. And because the EU is central to how we address the problems described above, we should be concerned how and for what purposes power is used by the EU.

Another question is connected to the characterization above: If the European Union is in crisis, what is the problem with it? This will be discussed in more detail below, but basically the problem is that Europe in general and the EU in particular are and have always been elite projects. They have concerned mostly relatively small groups of educated and influential people, and they have always had a problem connecting with wider popular sentiments. To say that Europe and the EU are elite projects is not, however, the same as to call them elitist. There are many competing projects on Europe and the EU, some of them more elitist and some less elitist. Nevertheless, they can all be characterized as elite projects.

Despite many achievements and continuing enlargement, the European integration project started after World War II is today in troubled waters. On the one hand, the problems are political: The EU is

suffering political malaise, as is shown, for example, by the blocked process of the European Constitution. On the other hand, the EU suffers from a lack of popular legitimacy, as exemplified by the alarmingly low turnout in the European Parliament elections.¹

1.1.1. The EU's political crisis

Although the EU, taken as a unit, has the world's third biggest population,² it is politically rather weak. This weakness is apparent in many areas. In global security and foreign policy, there is a lack of common policy, for example, towards the U.S.-led war in Iraq. In European security policy, there appears to be no effective means to solve the Kosovo crisis. In energy policy, there is no coherent approach to future energy sources.

This lack of common political power is, however, inherent to the European Union. As its original aim was economic integration, i.e. to create a European single market, its basic structures were not aimed at developing and deciding on common policies. Problems started to emerge only when the main contours of the European single market were established and the primary aim was more or less fulfilled. From the early 1990s, if not earlier, it started to become clear that in order to be globally competitive, more than economic integration was needed from Europe. In the Maastricht Treaty the EU's mandate was extended to include not only the economic area (Pillar I, European Community), but also common foreign and security policy (Pillar II) and cooperation in internal security (Pillar III, Police and Judicial Cooperation) (Treaty of Maastricht, 1991).

Thus there has been a growing tension between the need to create more centralized decision-making structures for the EU, i.e. to transfer more binding political powers to the European Commission and other EU institutions, and the traditional sovereignty of the EU's Member States. This tension has been exacerbated by the fact that the popular legitimacy of the European political system is still solidly based on the concept of the sovereignty of nation-states—although the national governments today are increasingly suffering a loss of popular trust as well.

That the EU is facing an inherent political dilemma is obvious when we compare its two recent major policy challenges: the Lisbon strategy (2000) (see Lisbon European Council, 2000; Lisbon New

Start, 2005) and the European constitutional process, leading to the adoption of the Treaty of Lisbon in December 2008 (Institutional Reform, 2007).

The Lisbon strategy was adopted by the European Council in March 2000. It set a target for the European Union “to become the most competitive and dynamic knowledge-based economy in the world” by 2010, and it recognized the need “to set a goal for full employment in Europe” within the same time frame (Lisbon European Council, 2000). The framework of the Lisbon strategy is global economic competition, in which the fear is that Europe is lagging behind not only the United States, but also the rapidly developing Asian countries. The aims and values promoted by the Lisbon strategy are measured in economic terms, such as competitiveness, profitability, growth, and efficiency. As was obvious by February 2005, the Lisbon strategy did not produce the hoped-for outcomes: “...the Commission finds the results to date somewhat disappointing and the European economy has failed to deliver the expected performance in terms of growth, productivity and employment. Job creation has slowed and there is still insufficient investment in research and development” (Lisbon New Start, 2005).

The fate of the Lisbon strategy can be compared with another major policy initiative of the European Union, the attempt to anchor the EU to a constitutional basis—and in effect, to transform the EU from an inter-governmental construction to a more federal structure or to a federation proper. Initially, the European Constitution was an attempt to meet two different needs: On the one hand, the need for more effective and more centralized policymaking, instrumental for the success of such initiatives as the Lisbon strategy; and on the other hand, the need to clarify the power structures and the legal basis behind the EU. The former was a response to the need for more efficiency; the latter was a response to the need for more democratic legitimacy and accountability (Eriksen, Fossum, Kumm & Menéndez, 2005).

Though it is clear that the main thrust of the constitutional process was to make the EU more transparent and democratically accountable, and to establish, at least in its initial stages, a European “rule of law,” other aspects of European developments took the forefront in the popular imagination. It is not accidental that the two strategic processes, the Lisbon strategy and the European Constitution, were conducted in

parallel. In public debate the hard economic aims and values of European integration—as promoted by the Lisbon strategy—took the front seat. The original attempt at the European Constitution was not seen as representing the democratization of the EU and promoting social and cultural cohesion, but promoting centralization and command-and-control type of governance, and transferring sovereignty from the nation-states to faceless Eurocrats in Brussels. Although the Treaty of Lisbon is presented as a political compromise and less than a Union constitution, it has been met with the same type of criticism.³

To sum up, the political crisis of the European Union does not essentially originate from the results of the French and the Dutch referenda to reject the European constitution. The crisis is between the two different logics or value systems that the EU attempts to nurture: market-based economic logic versus the democratic logic of social and cultural values.

1.1.2. The legitimacy crisis of the EU

As stated above, the results of the French and the Dutch referenda on the European Constitution were certainly not the cause of the crisis, but symptoms of a much deeper problem. The European Union is very difficult to popularize. Its decision-making processes are complicated and mostly not open to democratic accountability. It is not always clear how decisions are made. And it is not only because the tripartite structure of decision-making (in which the European Commission, the European Parliament, and the Council of the European Union use balancing powers) makes the development and negotiation of policies opaque, but also because the main responsibility for policy planning and advocating lies with the large army of civil servants and experts (about 23,000 in all) (European Institutions, 2008).

As a result, the European Union has remained remote to European citizens. And it seems that in the 2000s, the gap between the EU and the popular mood has actually increased. The recent results of the Eurobarometer, the official public opinion analysis institution of the European Commission, show that:

- Support for EU membership is decreasing among the citizens of the EU countries. In autumn 2006, only 53 percent of EU

citizens believed that their country's membership in the European Union was a good thing. The percentage was 55 percent in spring 2006.

- Only 46 percent of EU citizens viewed the European Union positively; this was clearly less than the 50 percent measured in spring 2006.
- An overwhelming majority of citizens in the largest eurozone countries believe the euro has damaged their national economies.⁴

European citizens' political alienation is also reflected in recent developments in the European Parliament elections. Turnout has been steadily declining: in 1979 it was 63 percent; in 1994 it was 57 percent; in 1999 it was 50 percent; and in 2004 it was 46 percent (European Parliament Elections, 2004). These figures contrast sharply with voting activity in national elections: between 1945 and 2002, the mean turnout in the EU countries has been 83 percent (Voter Turnout in Western Europe, 2004).

1.2. The media and communication policies of the European Union

European heads of state reacted to the results of French and Dutch referenda with shock. "Europe is not in a state of crisis—it's in a state of profound crisis," the then-President of the European Union, Luxembourg's prime minister Jean-Claude Juncker, reportedly said in June 2005.⁵ As the European Constitution process was effectively halted, in June 2006 the European Commission declared a period of reflection, which was to be used for an extensive public consultation about the future of Europe (European Council, 2005). The period was officially declared over in January 2007, but without any clear outcome.⁶ Despite the adoption of the Lisbon Treaty in December 2008, it seems that from now on, we will be living in a permanent period of reflection, as the legitimacy of the EU is constantly tested and questioned.

During the period of reflection, a major emphasis has been put on improving the communication and PR activities of the Commission, as several central documents show. These include:

- Action Plan to Improve Communicating Europe (July 20, 2005) (European Commission, 2005c);
- Plan-D for Democracy, Dialogue and Debate (October 13, 2005) (European Commission, 2005d);
- White Paper on a European Communication Policy (February 1, 2006) (European Commission, 2006a);
- Period of Reflection and the Plan D (May 10, 2006) (European Commission, 2006c); and
- Communicating Europe in Partnership (October 3, 2007) (European Commission, 2007a).

The deep concern raised by the results of the referenda in 2005 have been reflected in the EC's work in many ways. One example is the preparatory process of the new Audiovisual Media Services Directive,⁷ during which new kinds of extensive and multi-stakeholder consultations were exercised. In this process several new policy issues were raised for further exploration, including such topics as media pluralism (see Task Force for Co-ordination of Media Affairs, 2007) and media literacy (see European Commission, 2007b).

The following sections concentrate on three different areas of policies that appear to be either directly or indirectly initiated and affected as a result of the period of reflection: improving the European Commission's communication and PR work; emphasizing media pluralism in Europe; and promoting the European public sphere.

1.2.1. Improving the European Commission's PR work

The documents mentioned above place great emphasis on the reform of the communication and PR activities of the European Commission. The basic message is that the recent crisis of the European Union is rooted not in EU policies but in their ineffective communication to the wider European public. Notable obstacles to effective communication include the following three:

- The Commission's communication activities are criticized as insufficiently coordinated and planned. The messages were not linked to citizens' interests and needs, but instead, "current campaigns focus on the political elite and media and fail to portray

the benefits and consequences for day-to-day life in a direct and understandable manner.” Furthermore, the strategies were focused more on financing campaigns than developing dialogue and communication (see European Commission 2005c and 2006a).

- Constant tensions between the European Commission and the Member States have been negatively reflected in the public debate: “Ending the blame-game, both by Member States and the European institutions, is an important change that must take place” (European Commission, 2005d).
- The media has not played its part in promoting the European agenda. The media coverage of European issues “remains limited and fragmented”: between the reporting of major events such as European Council meetings, there are periods when “there is no comprehensive cover of EU affairs.” Regional and local newspapers “generally give little space to European issues.” In television and radio, “time devoted to political information and to European issues is squeezed still further and competition for ‘television space’ has increased” (European Commission, 2006a).

The solution, as suggested in the documents, is rather obvious: The Commission’s communication work must be improved. It should become more professional, more resources should be allocated, and new methods and new technologies must be applied. All this is aimed at listening better to and meeting the needs and aspirations of European citizens: “The European Commission is therefore proposing a fundamentally new approach—a decisive move away from one-way communication to reinforced dialogue, from an institution-centred to a citizen-centred communication, from a Brussels-based to a more decentralised approach” (European Commission, 2006a). After a lengthy period of discussion and consultation, this approach was detailed in the Commission’s communication document *Communicating Europe in Partnership* in October 2007 (European Commission, 2007a).

1.2.2 More Emphasis on Media Pluralism in Europe

As stated above, according to the White Paper in 2006, one of the reasons for the lack of popular support has been the negative exposure

of European issues in the media, which has hurt the image of the EU. The recent interest in media pluralism in Europe can be seen as an attempt to answer these concerns. In January 2007 the European Commission announced a “three-step approach” to media pluralism. According to this approach, “the notion of media pluralism is much broader than media ownership; it covers access to varied information so citizens can form opinions without being influenced by one dominant source. Citizens also need transparent mechanisms that guarantee that the media are seen as genuinely independent” (Task Force for Co-ordination of Media Affairs, 2007).

This is a new approach for two reasons. Earlier, the Commission was not willing to develop a clear policy towards the issues related to media pluralism, as they are closely related to questions of media ownership and media concentration. In the era of satellite television and the Internet, these issues are increasingly transnational in character, but they have traditionally been left to the realm of national legislation (Nesti, 2007). The second reason, related to the first, is that the authorities are traditionally reluctant to regulate print media, as they can easily be accused of curbing freedom of the press.

It is not clear where the three-step approach will lead. The first step was the publication of the Commission’s working paper in January 2007, which sets the outlines for the discussion (European Commission—DG Information Society and Media, 2007). The main aim seems to be to establish empirical indicators that can be used in measuring the level of pluralism in EU member countries. For this purpose, as a second step a major independent study has been commissioned. The third step will be the establishment of the indicators on the basis of a wide-scale consultation process (Task Force for Co-ordination of Media Affairs, 2007). No clear indication is presented, however, of what measures would follow as a result of the study.

1.2.3. Promoting the European public sphere

Although the main thrust of the documents presented above appears to be from many modern PR and corporate communication manuals, the documents also include elements that go much further and indicate a deeper understanding of the crises that the EU faces. The White Paper on a European Communication Policy (2006) discusses the prospects

and necessity to create the European public sphere, which is referred to with such attributes as inclusiveness, diversity, and participation (European Commission, 2006a). It must, however, be said that the development of the idea of the European public sphere is restricted almost exclusively to the White Paper, as in other documents it is only referred once or twice, without further explanation or context.

This attempt to bring not only Habermasian vocabulary, but also normative-theoretical insights of deliberative democracy to the debate on European communication policy is not accidental but deliberate. This is further shown by several public presentations by European Commission Vice President Margot Wallström, who is also the commissioner for institutional relations and communication. Echoing closely some interventions in the academic debate on the prospects for the European public sphere (see e.g. Risse, 2003; van de Steeg, 2002), she stated in January 2007: “It would be very important, from the ‘public sphere’ perspective, that issues of common interest—for example energy security, climate change, social Europe—are discussed more or less at the same time, by people across the European Union, and possibly within a common framework of values” (Wallström, 2007).

In the same speech, she also joined the debate on communication rights, central to the ideals of deliberative democracy. In defining the values and principles that should guide the EU’s communication activities, the starting point “can only be the citizens and their democratic rights,” which she listed as follows:

- The right to full and fair information about decisions that affect their lives, wherever they are taken;
- The right to hear and compare different opinions and points of views;
- The right to debate issues of common interest;
- The right to express their views and to be heard (Wallström, 2007).

Unfortunately Margot Wallström has been a rather lonely voice among the commissioners. After the publication of the White Paper in February 2006, the concept appeared only occasionally in the EU documents, and even then without any wider democratic-normative framework. It was resuscitated in October 2007 in the Commission’s

document *Communicating Europe in Partnership*, where a whole three-page chapter is titled “Developing a European Public Sphere” (European Commission, 2007a). However, the title is the only formal reference to the values and principles expressed in Wallström’s earlier speeches. The rest of the chapter deals with a set of institutional measures aimed at reinvigorating and refreshing the Commission’s PR work, following the lines of Plan D and the White Paper of 2006.

There appear to be two different approaches to the EU’s crises. The first assumes that what is needed is better management of the Commission’s communication and PR activities. The other sees that the crisis is basically a result of the lack of democracy, and that the remedy should be a conscious attempt to build something called the European public sphere. In what follows, I will explore the latter path.

1.3. European public sphere and citizens’ communication rights

The emphasis in the EU documents on the European public sphere does not come from nothing. In the last ten years or so, it has been a subject of increasing interest in European social and political research.⁸

It is fair to say that the number of potential research projects is much bigger, as only a few project proposals in the social sciences and humanities are accepted by the European Commission. A number of projects are additionally funded by national research funds.⁹ As is the case in the academic world, all these projects function as factories—producing seminars, conferences, workshops, publications—resulting in a small-scale academic industry on the public sphere.

Defying oversimplification, the main thrust of the projects mentioned above can be described in subsection 7.1.1. “Towards a European Public Sphere” in the EU’s FP 6th’s Specific Programme “Integrating and Strengthening the European Research Area.”¹⁰ In the call text the aim of the research is indicated: “The objective is to provide integrated perspectives on the roles of different social and political actors and assess their contributions towards the articulation of diverse public communicative spaces in Europe, as components of the broader public sphere” (FP6 Specific Programme, 2006, p. 16).

Even if in the text some reference is given to the study of the role of media policy and media economy in relation to the conditions for

the European public sphere, these issues are weakly articulated.¹¹ What seems to be missing both from the FP6 call and the research projects presented above are approaches that would concern more directly the role of the EU's media and communication policy, i.e. the challenges that the development of the European public sphere poses to the Europe-wide regulatory framework of media and communication.

1.3.1. Citizens' communication rights

In what follows, Margaret Wallström's statements concerning the European public sphere and citizens' rights will be taken as the starting point. The theoretical-conceptual basis behind the ideal of the public sphere will not be discussed here, as it is the subject of another debate (see, e.g. Nieminen 2006; Lingenberg 2006). Here the EPS will be adopted—as in Wallström's speech and in the formulation of the FP6 call—as a normative goal which represents an attempt at a more democratic Europe.

Instead, the focus here will be on the concept of citizens' democratic rights, which were central in Wallström's speech. We need, however, to go one step further from her formulation. Wallström's comments can be interpreted as speaking not of citizen's rights in general, but of rights that can more precisely be called communication rights: "The right to full and fair information [...] The right to hear and compare different opinions [...] The right to debate issues of common interest [...] The right to express their views and to be heard" (Wallström, 2007). Following Wallström's argumentation, the implementation of these rights is a condition for the realization of the European public sphere.

Obviously there has to be different means to realize these rights in practice. Some of them have to do with the function of public administration, and some of them with the political system more generally. Here the study will be restricted only to the role of the media, and the question is: How can we make the European media system serve citizens' communication rights better?

Although the concept of communication rights has been a part of the academic vocabulary for some time now, it does not appear to have been developed very systematically. Most often the concept has been discussed in reference to the late UNESCO's New World

Communication and Information Order (NWICO), as well as to the more recent World Summit on the Information Society (WSIS) (Hamelink, 2003a; Padovani, 2004; Mueller, Brenden, and Pagé, 2007). In recent years there have also been increasing attempts at an analytical definition of what constitutes communication rights, or—as the issue has also been approached—the right to communication.¹²

Although communication rights have not been internationally codified and they do not have legal status as such, many scholars argue that all their essential elements have been confirmed repeatedly by the international community in international treaties and conventions by the UN and its organizations,¹³ the Council of Europe (ECHR, 1950), and by the European Union.¹⁴ Communication rights have been categorized in many different ways (CRIS, 2005, pp. 39–49). A fourfold division based on the different dimensions of communication will be applied here, namely factuality, orientation, sociability, and self-expression (see also CRIS, 2005; Nieminen, Aslama, and Pantti, 2006; Moring and Nieminen, 2006; Wallström, 2006):

- 1) the right to information concerns the claim for factuality and accuracy of public representations;
- 2) the right to orientation concerns the plurality and diversity of opinions that are publicly offered or available;
- 3) the right to social and cultural communality refers to the availability of a rich variety of cultural representations, in both art and entertainment; and
- 4) the right to self-expression includes access to channels and platforms where citizens can make themselves heard and seen, and also listened to.

The problem, however, is that although these rights have been internationally agreed and confirmed in different arenas, it has not been possible to collect them into a unified framework and adopt them as a part of international law. It is not for lack of trying: Both the NWICO process in the 1970s and the WSIS in the early 2000s attempted to do this. Both of these processes also show the difficulties in having communication rights universally recognized (see, e.g. World Press Freedom Committee, 1981; Irani, 1998; Sussman, 2001). The result is that there is no coherent international regulatory framework or institutional

structure responsible for overseeing citizens' communication rights. There are some monitoring agencies (for example, European Audio-visual Observatory, European Institute for the Media, Institute of European Media Law, and EU Monitoring and Advocacy Program of the Open Society Institute) and several civic organizations (for example, Communication Rights in Information Society [CRIS], The Campaign for Press and Broadcasting Freedom, and Campaign for the Freedom of Information), but there is no single legal instrument to guarantee the use of these rights.

1.3.2. The EU's regulatory framework

From the point of view of citizens' communication rights, Europe is an interesting case, as most European countries are parties in the international treaties and conventions discussed above. How would the situation in Europe appear when measured against the normative model of citizens' communication rights? The brief answer would be: not well. As a matter of fact, the situation in European regulation of media and communication seems rather incoherent, as there are different regulatory logics applied to different branches of the media. Telecommunications have traditionally followed a different regulatory regime than electronic media (radio and television), and the print media have traditionally been dealt with differently from other media.

Basically, we can distinguish among three different regulatory approaches that have been applied in EU's media and communication regulation:

- 1) Common market principle, the normative basis of which is competition law. This has been the regulatory philosophy behind telecommunications regulation. According to this approach, the aim of public regulation is to create conditions for fair competition in the marketplace. Public intervention is allowed only to block attempts to establish monopolistic control of the markets. This would also be the best guarantee for citizens' rights as consumers.¹⁵
- 2) Freedom of speech principle, which is mainly an application of *laissez-faire* philosophy to media and communication markets. This is traditionally the mode of regulation applied to the print

media. According to this approach, all public regulation is bad, as it interferes with self-regulating free markets. The public interest is best realized when governments allow particular interests to enter freely to the marketplace of ideas.¹⁶

- 3) The public service principle, which has been applied to the broadcasting media in most European countries, although to different degrees and in different ways. The dominant argument justifying the public service approach has been that because the radio frequency band spectrum is (or has been) limited and not all potential broadcasters can have equal access to the scarce frequencies, access has to be determined on the basis of public interest, in contrast to commercial or political or other types of particular interests (see e.g. Mott, 1972, pp. 590–591).

When assessing the development in EU policies from the 1980s onwards—especially the directive Television Without Frontiers (1989), the Green Paper on Convergence (1997) and the subsequent directives on electronic communications (2000–2002)—one cannot help noticing that the main thrust has been away from public service principle towards the *laissez-faire* approach.¹⁷

Of these three approaches, closest to citizens' communication rights is obviously the public service principle, as it anchors its normative basis to public interest—in contrast to “fair competition” of the common market principle and “free market” of the freedom of speech principle (see, e.g. EBU, 1998; Council of Europe, Parliamentary Assembly, 2004; UNESCO, 2007). The problem is, and has been for some time now, that the public service principle in media and communication has traditionally been linked only to radio and television broadcasting, and that as its main justification has remained the argument for scarce radio frequencies.

This argument began, however, to wear thin in the 1980s and 1990s with the development of new information and communication technologies—satellite, fiber cable, Internet. Instead of channel scarcity, there appears today to be channel abundance. In the 1990s, the defenders of the public service principle in media and communications policies faced intensifying pressure from market-oriented media and communication lobbyists, as exemplified by the long and difficult negotiation and compromise haggling on the new version of EU's

Television Without Frontiers directive.¹⁸ But instead of expanding the democratic public interest argument to new fields of media and communication, public service supporters retreated to a more narrow position of cultural nationalism. In the Amsterdam Protocol (1997) the European Union stated that as “the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism,” the public funding of broadcasting organizations will be allowed, but only as long as it does not compete directly with commercial actors—or as the Protocol says: “...insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest” (Amsterdam Protocol, 1997; see also Amsterdam Protocol FAQ, 2005).

From the point of view of citizens’ communication rights, instead of narrowing the public service principle, its scope should be expanded to guide European media and communication policies as a whole, including telecommunications and the print media. In this light, the Amsterdam Protocol should be rephrased: “...the European media and communication system in its totality is directly related to the democratic, social and cultural needs of European society and to the need to preserve media pluralism in Europe.”

1.4. Towards a democratic regulatory framework

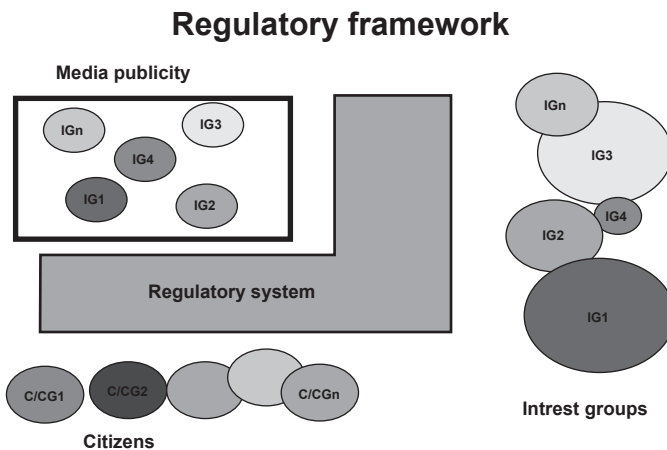
What would the communication rights perspective outlined above mean for the European media and communication regulatory framework? Basically, it would mean that the whole European media and communication system, with all its branches, would have to be assessed to see to what degree it satisfies the rights. In this respect there are four main requirements: access, availability, competence, and dialogicality.¹⁹

- By access, we mean that citizens should have equal access to information, orientation, and other contents serving their rights;
- By availability, we mean that relevant and high-quality content (of information, orientation, and so on) should be equally available for citizens;

- By competence, we mean that citizens should possess the skills and abilities to use the means and information available according to their own needs and desires;
- By dialogicality, we mean that there should be public spaces available that allow citizens to publicly share information, experiences, views, and opinions on matters of common interest.

In practical terms this means that there should be a regulatory system that balances the social, cultural, and other inequalities in relation to access and availability, and which creates spaces for dialogue and debate. The regulatory system functions as a “filter” in two directions, both in the “input” and the “output” stages of communication. The “end product,” that is, the arena where the different voices of citizens and citizens’ groups meet on an equal basis, is media publicity (see Figure 1.1).

Figure 1.1. A scheme of the regulatory framework of the media

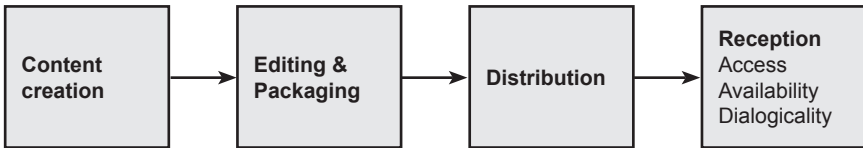


- IG = interest groups, some bigger and more influential, some smaller and with minimal influence
- Regulatory system = legislation, self- and co-regulation, civic control, market regulation
- Media publicity = the representation of different interests balanced and equalised by the means of the regulatory system
- C/CG = citizens, citizens groups; the regulatory system balances the availability of media contents to different citizens and their groups.

One obvious way of assessing the realization of communication rights is to measure the media performance, that is, to what degree the “end product” fulfills the requirements set above: How well the regulatory system has been able to balance and equalize the access and availability of different interests, and how it has promoted real dialogue and debate between them. However, by studying only media publicity we do not get very far. All fundamental decisions concerning access, availability, and dialogue are made before the “end product” phase of the media process. We need more tools in order to get beyond the media publicity and to have better access to the decisive moments in media production. For this purpose, the value chain analysis can offer us such tools (see Fine, 2003; Daley & Simonian, 2005).

In a simplified version, the basic value chain model for the media industry consists of four basic elements: content creation; editing and packaging; distribution; and reception (the terms may differ according to their usage) (see Figure 1.2).

Figure 1.2. Value-chain model of media production



In each phase of the value chain, crucial decisions are made that affect the end product (a television program, a newspaper, a Web site). From our normative point of view, all these decisions have an impact on how the final media contents meet the criteria of citizens’ communication rights. Today all the phases of the media value chain are regulated through different pieces of legislation. This takes place mostly on the national level of regulation, but increasingly the media is regulated on the European level (EU) and also on a global level (WTO, ICANN, ITU) (see ÓSiochrú, Cirard, and Mahan, 2002; Dupagne, 2003).

More practically, this means that, for example,

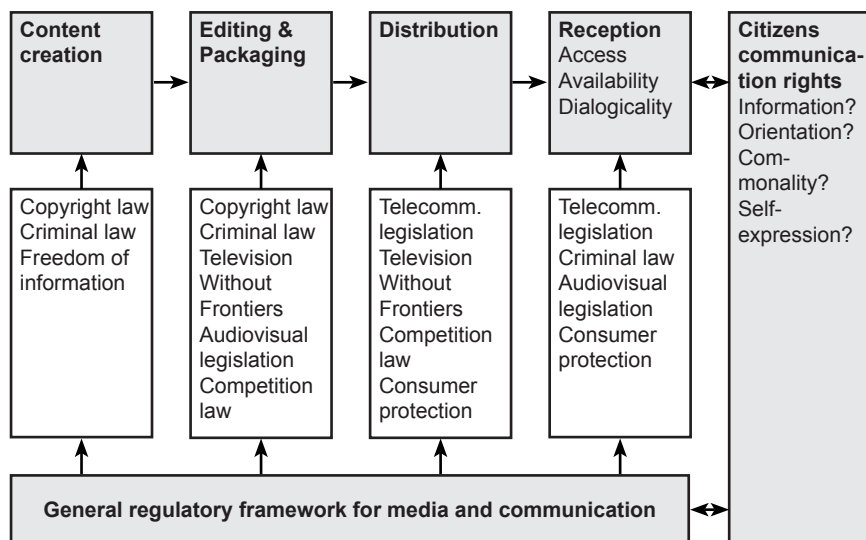
- in the phase of content creation, not only national legislation but more and more international contracts and conventions regulate the interpretation of copyright;

- the phase of editing and packaging is regulated through several different legislative regimes: copyright law, criminal law (e.g. libel, indecency, secrecy), and competition law;
- the phase of distribution is regulated by audiovisual and telecommunication directives of the European Union.

Naturally several legal regimes overlap and cover many of the phases in the value chain. Thus, for example, competition law applies to all phases and so does criminal law. Their ways of application may, however, differ. By mapping out different pieces of international and national laws and acts that regulate media and communication in Europe, and by connecting them with the respective phases in the value chain model of the media, we would eventually be able to draw a picture of the European regulatory framework in its entirety, as the schematic presentation shows (see Figure 1.3). That would then allow us to make well-informed judgments on the realization of citizens' communication rights in Europe today.²⁰

From the point of view of democratic regulation, especially interesting are legislative measures that are both proactive, that is, aiming at steering developments beforehand instead of only reacting afterwards;

Figure 1.3. Value-chain model of regulatory framework



and positive, that is, supporting desirable behavior instead of just prohibiting undesirable behavior. Such measures include press subsidies, financial support for audiovisual production, various kinds of production quotas, and various programs of media literacy and education. From this perspective, relevant questions would be: What is the history of proactive measures in media and communication policies? What is their practical relevance to citizens' rights? What are the prospects for these kinds of policies today?

It is, however, true that the legal framework is only one—albeit the most important—part of the regulatory system. The media and communication are increasingly regulated also by different forms of self- and co-regulatory means, such as codes of conduct, ethical councils, and in-house rules, which should also be taken into account (see, e.g. *Self-regulation of Digital Media*, 2004; *Co/Self-regulation bodies*, 2005). These self- and co-regulatory means are still mostly national. Almost no trans-national self-regulatory regime seems to have developed in any branch of media and communication, except in the area of marketing and advertising, where the International Chamber of Commerce has shown leadership (see *Consolidated ICC Code*, 2007).

1.5. Conclusion

The main argument in this paper has been that if the European Union is serious about achieving genuine democratic legitimacy, its media and communication policies need radical change. The media and communication system is today as central a part of our European democracy as are the institutions of representative democracy—or even more central. European democracy needs a functional European public sphere, where topics of common interest can be discussed at the same time by citizens, sharing the same information and orientation, in different parts of Europe and in different European languages (see e.g. Risse, 2003). Today no such European public sphere exists. What is needed is a consistent all-European policy to create overall conditions for the public sphere to develop. I call this a policy towards creating a democratic regulatory framework for European media and communication.

The argument was developed in three stages. First, the present condition of the European Union was explored and was found to be

in a twofold crisis of politics and popular legitimacy. It was concluded that the origins of the crisis lie in the conflict of two different value-systems that the EU has not been able to help balance: market-based economic logic versus the democratic logic of social and cultural values. Second, the ways the European Commission attempts to use the media and communication policies in solving the crisis were discussed, as well as how the Commission has employed the notion of the European public sphere in this attempt. Special emphasis was given to the endeavors by commissioner Margot Wallström and her efforts to incorporate the Habermasian sense of the public sphere into the European Commission documents.

Third, a proposal for a new democratic regulatory framework for European media and communication was outlined. The proposal is based on the concept of citizens' communication rights, which, although not codified, have allegedly been established through international treaties and conventions. These rights consist of four components: rights to information, orientation, social and cultural communality, and self-expression. The problem is, however, that the actualization of these rights depends on the media and communication system, which may or may not support them. That is why public regulation is needed to balance and equalize different social interests' access to and availability of the media, and to level different barriers to critical public dialogue.

It is not enough, however, to assess the actualization of communication rights only on the basis of media publicity, as it reduces the regulatory means to concern only media content and media distribution. Crucial decisions affecting the so-called end product (a television program, a newspaper, a Web site) are made in all preceding stages of the media production process. All these decisions have an impact on how the final media publicity meets the criteria of citizens' communication rights.

All phases in media production are regulated today through different legislative and self- and co-regulative means. This takes place mostly on the national level, but increasingly on European (EU) and global (WTO, ITU, ICANN) levels. What is proposed is to develop a systematic approach, based on a value-chain model of analysis of media production, that can help us create a comprehensive picture of the present regulatory framework of European media and communication. Based on this, we could then ask questions like:

- How consistent is the European regulatory framework in general from the normative point of view? Do we find contradictory elements that could then be used in our attempt to democratize the framework?
- What normative goals do we find to serve its different components today, and how do they relate to citizens' democratic communication rights?
- What kind of regulatory measures would best serve citizens' communication rights at each phase of the value chain?
- What is the role of positive proactive measures compared to negative and reactive measures? How can we best assess the efficiency of positive proactive measures?

These questions might also lead us to establish a set of transparent criteria for each phase in the value chain in order to ensure that the media production fulfills its democratic functions. Another question is what criteria there should be and how they should be enacted.

NOTES

¹ See e.g. Spiegel, 2005: "Brussels in Crisis."

² In 2006 the EU (with 25 Member States) had 457 million inhabitants. China had 1.288 billion and India had 1.064 billion. The United States had 291 million and Indonesia had 245 million. See GeoHive, 2007.

³ See comments by the NGOs and Think Tanks, EurActive 2008.

⁴ Eurobarometer 66: Public Opinion in the European Union 2006; Eurobarometer 251, 2006: Special Eurobarometer: The Future of Europe. The results from autumn 2007 show some increase in popular support for the EU, which may indicate that the situation might be improving. See Eurobarometer 68: Public Opinion in the European Union 2007.

⁵ EU 'crisis' 2005; see also EU Faces Crisis 2005; EU Summit Failure 2005.

⁶ Constitutional Treaty 2007. Official closure—at least for the time being—was offered only in December 2007, when the long process of creating the European Constitution was brought to an end, as the heads of the EU Member States finally adopted the Lisbon Treaty.

⁷ European Parliament and the Council 2007. On the consultation processes, see AVM Policies 2008.

⁸ Some of the EU-funded projects dealing with the European public sphere, either directly or indirectly, can be listed here as examples:

- AIM: Adequate Information Management in Europe (<http://www.aim-project.net/index.php?id=4>; retrieved October 24, 2006)—directed in Germany,
- CIDEL: Citizenship and Democratic Legitimacy in Europe (<http://www.arena.uio.no/cidel/index.html>; retrieved October 24, 2006)—directed in Norway,
- EMEDIATE: Media and Ethics of a European Public Sphere from the Treaty of Rome to the “War on Terror” (<http://www.iue.it/RSCAS/Research/EMEDIATE/Index.shtml>; retrieved October 24, 2006)—directed in Italy,
- EUROPUB.COM: The Transformation of Political Mobilisation and Communication in European Public Spheres (http://ec.europa.eu/research/social-sciences/knowledge/projects/article_3479_en.htm; retrieved October 24, 2006)—directed in Germany,
- Eurosphere: <http://www.eurosphere.uib.no/about.php>—directed in Norway,
- IDNET: Europeanization, Collective Identities, and Public Discourses. (http://ec.europa.eu/research/social-sciences/knowledge/projects/article_3501_en.htm; retrieved October 24, 2006)—directed in Italy,
- RECON: Reconstituting Democracy in Europe (<http://www.arena.uio.no/recon/>; retrieved October 24, 2006)—directed in Norway,
- CINEFOGO—Network of Excellence: Civil Society and New Forms of Governance in Europe—the Making of European Citizenship (<http://www.cinefogo.org/>; retrieved April 26, 2007)—directed in Denmark.

⁹ See e.g. European Public Sphere(s): Uniting and Dividing, University of Helsinki (<http://www.valt.helsinki.fi/blogs/eupus/>; retrieved April 26, 2007); Media, Democracy and European Culture (Europe in Transition) (http://humanist.hum.ku.dk/kalender/2006/oktober/media/_#program; retrieved April 26, 2007).

¹⁰ See the whole reference for FP6 Specific Programme 2006: “FP6 Specific Programme ‘Integrating and Strengthening the European Research Area’, Priority 7: Citizens and Governance in a knowledge based society. Work Programme 2004–2006. Research Area 7: New forms of citizenship and cultural identities. 7.1. Topics for Networks of Excellence and Integrated Projects. 7.1.1. Towards a European public sphere” (ftp://ftp.cordis.europa.eu/pub/fp6/docs/wp/sp1/g_wp_200202_en.pdf; retrieved April 26, 2007).

¹¹ In regard to media economy, the reference is the following: “The role of electronic and print media should be examined in terms of agenda setting and generating debate and controversy in relation to cultural, societal, political and economic matters, with particular emphasis on European issues; the implications of media concentration or variations for the pluralism and integrity of information could be examined in this regard.” FP6 Specific Programme, p. 16.

¹² Birdsall and Rasmussen 2000; Birdsall and McIver 2002; Statement on Communication Rights 2003; Birdsall, Rasmussen, and McIver 2003;

McIver, Rasmussen, and Birdsall 2004; CRIS 2005; Hicks 2007; Padovani 2007.

¹³ For example,

- On the principle of freedom: Freedom of Expression: Universal Declaration of Human Rights (1948), Article 19; International Covenant on Civil and Political Rights (1966), Article 19; Convention on the Rights of the Child (1989), Article 13; Protection of privacy: Universal Declaration of Human Rights (1948), Article 12; International Covenant on Civil and Political Rights (1966), Article 17; Convention on the Rights of the Child (1989), Article 16;
- On the principle of inclusiveness: Universal Declaration of Human Rights (1948), Articles 19, 21, 28; International Covenant on Economic, Social and Cultural Rights (1966), Articles 13, 15; Declaration of the Principles of International Cultural Co-operation (1966), Article IV (4).
- On the principle of diversity: International Covenant on Civil and Political Rights (1966), Articles 1 (1), 27; Universal Declaration on Cultural Diversity (1995), Article 5.
- On the principle of participation: Universal Declaration of Human Rights (1948), Articles 21, 27; International Covenant on Civil and Political Rights (1966), Article 25. See also the UNESCO Diversity Convention (2005) .

¹⁴ See Declaration of the European Union (1998); see also recent EC documents on European communication and media policies: Plan-D (European Commission, 2005d); White Paper (European Commission, 2006a); Media Pluralism (Task Force for Co-ordination of Media Affairs, 2007).

¹⁵ According to Finnish scholar Eero Paukku, the market-based line of argumentation has been adopted by the European Court of Justice in its rulings concerning media-related cases. See Paukku, 2006.

¹⁶ According to Paukku, this argumentation has been followed by the European Court of Human Rights. See Paukku, 2006.

¹⁷ TVWF Directive 1989; Regulatory Framework for Electronic Communications 2000–2002; Green Paper on the Convergence 1997. See Kaitatzi-Whitlock, 2006.

¹⁸ About the process and the outcome as of autumn 2007, see European Parliament and the Council, 1997 and 2007.

¹⁹ These four requirements are a free operationalization of Habermas' conceptualization of the public sphere.

²⁰ The value chain model of the media's regulatory framework is much easier to envision on a national scale than on an EU scale. See Moring and Niemenen, 2006.

CHAPTER 2

Visions of Media Pluralism and Freedom of Expression in EU Information Society Policies

MIYASE CHRISTENSEN

2.1. EU information society visions

Since the “information revolution” started to take hold in the 1980s and particularly in the early 1990s, a great deal of academic research has been published on information and communication technologies, convergence, and resulting impacts (e.g. Castells 1996, 1997, 1998; Webster, 1995; Schiller, 1999; Golding, 2000; Kellner, 1999). While popular and neo-liberal discourses on the digital age have generally celebrated the potential inherent in these technologies and supported the market-friendly economic and regulatory regimes, a more skeptical approach was sustained in the political-economy tradition of communications research. The implications of market consolidation and the narrow policy aims put forth in relation to technology convergence were scrutinized from a variety of critical perspectives (e.g. Garnham, 1994, 1996; 2000; Calabrese and Burgelman, 1999).

Although it started later than its transatlantic and transpacific neighbors, the EU has always sought to create a competitive knowledge economy and an inclusive information society based on a number of conflicting tenets: rigorously competitive market-oriented media regimes, external and internal media plurality, and equal access norms. Many in the field of media and communication studies have criticized the singularity of such policy-established notions of new economy and information society. Castells and Himanen (2002), for example, note in their analysis of the Finnish synthesis of the information society and welfare state (the so-called “Finnish model”) that the information society (IS) can exist in different political, economic, and social models, and take different forms. They suggest that just as the Industrial Revolution took diverse shapes in the West, in the Soviet bloc, and in East

Asia, IS is not a uniform global phenomenon, but rather a long-term social and economic process contingent upon circumstances in different places and times. A rich body of literature has also been produced (e.g. Preston, 2003; O Siochrú, 2004; Hamelink, 2003) examining whether alternative visions of IS can or should exist, with communication rights and a communication society epitomizing one such vision. At the global level, during the UN World Summits on Information Society (WSIS) in Geneva (2003) and Tunis (2005), the very concepts of IS, communication rights, cultural diversity, access to information and freedom of expression, media concentration, and a range of related notions were also opened up for questioning, as was the level of control over IS exercised by a limited number of powerful architects. The EU, after the second phase of the Summit in Tunis, pleaded for freedom of speech as a mechanism to bridge the digital divide (EC-DG Information Society, November 16, 2005)—although the EU participation in and response to the summit and the questions that ensued thereafter did not go much beyond reaffirming the existing EU IS policy agenda.

What has underlaid the EU IS policy rhetoric so far is an uneven power geometry constituted by various actors. As Harcourt (2002, p. 4) observes in her analysis of European media regulation: “much of the driving force behind changes in national policies is EU industrial policy.” As she further discerns, the media industry, in the 1980s and 1990s, was perceived as the remedy for unemployment and a decline in economic growth. The Commission’s later attitudes toward and expectations from the growing centrality of IS technologies in everyday life ran parallel to this vision. In addition to the growing importance of media industries, the emergence of new media technologies, particularly of the Internet, as an immensely powerful force in the 1990s (coupled with ubiquitous and ambitious competition from the United States and the Asia-Pacific region) resulted in a realignment of focus in the EU media and communication policy domain from traditional audiovisual systems and related issues to information and communication technologies (ICT) and convergence. In response to a global-scale move toward deregulated market structures and commercialized activity in communications, the (infamous) Bangemann Report (1994) argued in favor of streamlining the EU information sector based on private sector funding and consolidating the related EU policy framework to establish a competitive single market environment (Christensen,

2006).¹ Regulatory complexities brought about by convergence and efforts to tackle this challenge marked the EU IS policies throughout the 1990s. Worth mentioning is *Towards an Information Society Approach: Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors and the Implications for Regulation* (European Commission, 1997), in which various responses to rapid convergence were contemplated. The main objective of this allegedly interrogative document was to address what convergence entailed and to stimulate debate on likely regulatory approaches to be adopted. However, an inclination toward minimizing regulation and pulling audiovisual services closer to the domain of IS was evident in the rhetoric of the document. In the following years, various discussions ensued within the Commission—particularly Directorate General Information Society and Directorate General Education and Culture—and among stakeholders across the region. In 1999, as a culmination of this intense discussion and negotiation process, the Commission issued a Communication (*Principles and Guidelines for the Community's Audiovisual Policy in the Digital Age*), which assumed a watchful but calm attitude toward the contingencies of technological change (European Commission, 1999). Overall, while the earlier EU policy scope of the 1990s focused on market restructuring (liberalization and reregulation) and macrodynamics, concern over socio-cultural issues found their way into policy considerations, particularly due to a rapid migration of content onto new media and tendencies toward concentration of media ownership in the commercial environment.

At the renowned 2000 Lisbon summit, which centered on information society issues, the heads of EU Member States resolved to become “the most competitive and dynamic knowledge-based economy in the world” (European Commission, 2000a). To benefit fully from the potential economic and social riches offered by IS technologies, the E-Europe Action Plan was initiated in June 2000. The main intention of the action plan, and the preceding E-Europe initiative launched in 1999, was to accelerate “the uptake of digital technologies across Europe” and to “ensure that all Europeans have the necessary skills to use them” (European Commission, 2000c). Three interlinked methods were identified to reach this goal: accelerating the setup of an appropriate legal environment on a European level; supporting new infrastructure and services across the region;² and applying the open method of

coordination and benchmarking (2000c, pp. 2–3). The potential of ICTs, and particularly of the Internet, to increase employment and to restructure the economy were accentuated as part of the initiative, pointing to the need to create a competitive European market and skilled labor.

In 2002, E-Europe 2002 was finalized, and the E-Europe 2005 action plan succeeded it, mainly focusing on Internet connectivity in Europe. The aim of E-Europe 2005, approved by the Seville European Council in June 2002, was to achieve further economic productivity and to increase the quality and accessibility of services for all European citizens based on a secure broadband infrastructure. Broadband will ensure high-speed and continuous access to the Internet. In line with the previous set of policies and strategies engineered by the Commission and the action plans pursued (e.g. E-Europe 2002, and E-Europe+ launched in 2001 by the then-candidate countries), E-Europe-2005 centered on combining the social and the cultural aims with the economic aims. Increasing European competitiveness on the whole was the main motive (Christensen, 2006). And, in the epochal fifth enlargement process to integrate ten plus two countries, the EU attributed a central role to the information society, as noted at the European Ministerial Conference in June 2002: “At this crucial moment in Europe’s political development, we underline the importance of the Information Society in increasing social and cultural cohesion and in strengthening economic integration” (p. 3). While the EU Commission realigned the heavily techno-deterministic policy approach of the 1990s (particularly in market deregulation) in favor of a more human-centered IS rhetoric in the late 1990s and the 2000s—social inclusion was indeed more integral to the discourse of the later policies—“market” still retained its dominance over “social.”

In the 2000s, following from the earlier policy scope, the Commission’s response to the ever-increasing convergence of traditional and new media realms has been a gradual move toward engineering a convergent policy regime in order to merge the two formerly distinct fields in a uniform policy scope for the purposes of maximizing economic gains.³ The urgency of dealing with economic stagnation and the stringency of the growth and employment-related problems experienced in particular by larger European economies were reflected in

the relaunched Lisbon strategy agenda of the Barosso administration in 2005. Economic growth and employment were declared to be the EU's top priorities. Cultural policies and new media and content sectors gained paramount significance at this time—although the primacy of the cultural sector had been acknowledged since the 1980s—as they were explicitly assigned a greater role in ensuring the future of European competitiveness and social well-being.

As the E-Europe 2005 Action Plan came to an end in 2005, the head of the Directorate General Information Society and Media, Viviane Reding, put forward a new initiative in June 2005. *i2010: A European Information Society for Growth and Employment* was designed to realize the goals of the new Lisbon Strategy and to “build towards an integrated approach to information society and audiovisual media policies in the EU” (European Commission, 2005a, p. 3), the primary aim being to ensure the compatibility of a multitude of content services and technologies. *i2010* has three specific policy objectives: to create a common information space based on the strengthening of an open and competitive single market for communication and media services; to ensure European technological leadership by encouraging private and public research and innovation in ICT; and to promote a more inclusive information society in Europe, by better exploiting ICTs to improve quality of life (European Commission, 2005a).

Within the scope of *i2010*, “a single European information space,” a number of regulatory mechanisms and various other instruments are utilized together to regulate: 1) the networks, and, 2) content available via these networks (through the TVWF Directive currently in effect and the recently adopted AVMS Directive; Copyright and Digital Rights Management; instruments regarding Web accessibility). Actions that are devised for the operationalization of the *i2010* goals are grouped under investment and innovation in research; inclusion, better public services and quality of life; and various other flagship initiatives (such as in the area of preserving European cultural heritage). At present, electronic commerce, in line with internal market logic, is regulated through the E-Commerce Directive and maintains the country-of-origin principle (the receiving Member State cannot restrict incoming services).

2.2. Media pluralism and freedom of speech in the European IS: a contentious terrain

Because of increasing economic globalization, questions regarding the changes to apply to, and continuities to prevail within, key social and political institutions such as the nation-state, public sphere, and citizenship have been paramount since the 1980s. As Sassen (2003, p. 42) observes, for example, the sociopolitical and economic forces at play today are destabilizing the institutions of nation-state and citizenship: "Through their destabilizing effects, these dynamics are producing operational and rhetorical openings for the emergence of new types of political subjects and new spatialities for politics." In historically market-based national economies such as the United States, media and communication policies have been informed primarily by the business volume available domestically, projected demands/perceived needs of the consumer society and input from civil society actors. In European welfare-state regimes, the state has traditionally been seen as the guarantor of rights and entitlements for all citizenry, and the legitimacy of national policies has historically been measured against notions such as citizen's rights, inclusive public spheres, freedom of speech, social benefits, sustainable consumption, and the like. Within the past few decades, due both to increased globalization, as Sassen surmises, and to the persistence of techno-capitalistic industry policies (including media and communications), this perceived responsibility has seemingly been shifting toward the economic enterprise and competitive dynamics, thereby (potentially) destabilizing sociopolitical institutions and undermining the normative grounds for public interest concerns and policy actions.

Europe is a particularly complicated case in this regard. The moral and political foundations upon which the EU has historically been built are undoubtedly liberal democracy, freedom of speech, and a universal understanding of human rights and human dignity. Yet, as Ward (2002) argues, the process of increased integration raises the problem of legitimacy in governance, "as a directly accountable set of institutions responsible to the public is currently absent" (2002, p. 1). Ward points out that a democracy gap exists between the EU institutions and suggests that:

“The gap, frequently referred to as the democratic deficit, has become one of the most salient criticisms of the European Union by both the proponents of the European Union project, who push for more democratic accountability at the supranational level, and opponents of integration who utilize the argument to bemoan the loss of national sovereignty to unwieldy and unaccountable powers” (2002, p. 1).

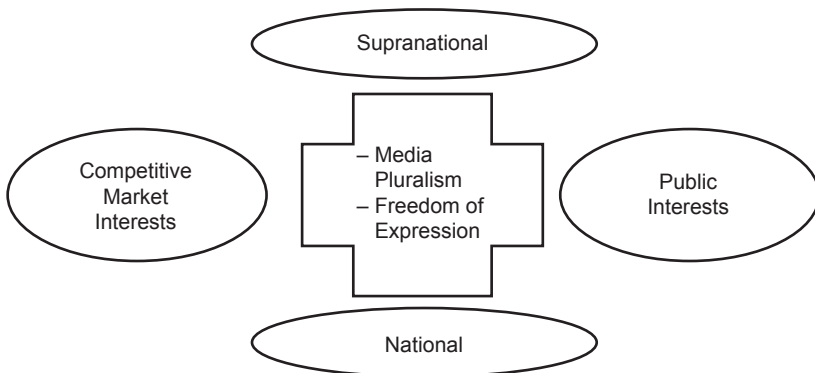
Emblematic of this problem are the differences of approach to public-interest issues between the EP and the Commission, and the inability of the Commission to draw support from stakeholders to establish legitimate grounds to safeguard media pluralism and freedom of expression through supranational regulation. The 1990s were marked by various efforts and initiatives within the EU to devise a common, effective, all-encompassing definition of media pluralism. There were no concrete outcomes, despite the efforts of the European Parliament.⁴ The 1992 Green Paper *Pluralism and Media Concentration in the Internal Market: An Assessment of the Need for Community Action* (European Commission, 1992) was debated for a long time and was lobbied against by a number of powerful industry actors. While some media owners supported a supranational framework to safeguard external pluralism earlier in the 1990s, due to the prospects offered through a liberal environment, they later shifted toward opposing EU intervention in this area. *The Issues Paper for the Liverpool Audiovisual Conference: Media Pluralism—What Should Be the European Union’s Role?* (European Commission, 2005b), which came out of the Liverpool Audiovisual Conference, did not lead to consensus among the stakeholders involved regarding the prospect of intervention at the supranational level. The absence of a binding supranational social act such as an EU Constitution and the principle of subsidiarity also makes it difficult to impose common normative principles. EU governance is very complex, and the resulting process causes ambiguity and hierarchy in the mutual roles of the Commission (and the Directorates General), Council of Europe and the European Parliament vis-à-vis the national governments and market actors.⁵

As Sarikakis and Chakravartty (2006, p. 114) note, “the legitimacy of the IS visions rests on the articulation of ideas and the construction or apprehension of the ‘facts’ by the various institutional actors engaged in the practice of shaping policy.” During the 1990s, we

witnessed government attempts to organically and structurally link IS discourse and economic globalization with that of welfare regimes in explicit ways, most notably in the United Kingdom. As Hudson (2003) observes, the Labour Party crafted a narrative in which ICT-driven transformation and the role of technology in economic prosperity were central components: a signpost in the rhetoric of the “Third Way.” By suggesting that IS requires discontinuities with the past, the Blair government rationalized the desertion of traditional egalitarian policies, creating policy tensions regarding where the welfare state is headed in the United Kingdom. Through certain discursive strategies, decision-makers at the EU Commission have also argued for conceding to the supremacy of market forces. The EU-engineered meta-narrative of IS legitimizes the vision of a competition-driven European knowledge society where the market, not elected governments, takes care of social and cultural obligations for the most part, with the state acting as a mediator. As a result, the historically “public” nature of media pluralism and freedom of speech are challenged, and they emerge as a contentious terrain between the various interests and claims represented by supranational, national, market, and public power nodes (see Figure 2.1).

In the framework of existing IS directives, media pluralism is inferred—e.g. provisions regarding frequency allocations, universal access, media literacy—rather than explicit. The regulatory scope of new media and electronic communications is composed of five Directives

Figure 2.1. Media Pluralism/Freedom of Expression Power Dynamic



that provide the framework for electronic communications in the EU.⁶ Unsurprisingly, these Directives are limited in scope in terms of addressing issues related to pluralism and freedom of expression. National regulatory bodies are assigned the responsibility of ensuring that cultural and linguistic diversity is promoted and consumers are protected. Primarily, the framework is an instrument designed to tackle economic regulation. It seeks to protect the consumer through legal obligations pertaining to privacy and data protection, universal service, and user rights. It does not deal with content services except in specific cases of bundled content and communications services. In June 2006 the EU Regulatory Framework for electronic communications networks and services was reviewed, and the results were documented in a Communication (European Commission, 2006b). The 2006 Communication notes that overall, the regulatory framework has been successful in achieving the policy goals and addressing new technologies. In addition to changes in spectrum management and market review, the Communication also points to a number of areas that need further improvement: consolidating the single market; strengthening consumers and user interests; improving security; and removing outdated provisions. The ultimate goal here remains economic maximization, and currently, the Directorate General Information Society and Media is updating the telecommunications package to strengthen the single market and support economic growth.

i2010 actions are evaluated and the upcoming actions/issues identified in the form of annual reports. The most recent Annual Report (European Commission, 2007c) notes a couple of recent actions pertaining to pluralism and freedom of expression, such as the Ministerial Conference “ICT for an Inclusive Society” held in Riga in June 2006.⁷ The declaration that was adopted set a number of priorities to address disadvantages arising from geographic isolation and old age. It also listed priorities for the enhancement of eAccessibility, digital literacy, cultural diversity, and inclusive eGovernment services, and the protection of pluralism and freedom of expression was noted as an important element for an inclusive European IS.⁸ As noted in the 2007 Annual Report, The Commission Staff Working Paper *Media Pluralism in the Member States of the European Union* (European Commission—DG Information Society and Media, 2007) represents another action taken within the scope of the *i2010* action plan. In response to growing

concern from the European Parliament, NGOs, and other interest groups over concentration of media and its probable impact on pluralism and freedom of speech, the Commission issued a working paper in January 2007 concerning media pluralism in the EU Member States. The initiative was called the “Reding-Wallström” approach, and Wallström (European Commission—DG Information Society and Media, 2007) declared, “Communication—understood as a lively and civilized debate among citizens—is the lifeblood of democracy.” Maintaining the Commission position for a hands-off approach, the initiative refrains from putting forward institutional will toward adopting a common legislative framework at the supranational level. Instead, it introduces a three-step approach to *monitor* media pluralism and freedom of speech across Member States through an independent study and to issue a Commission Communication thereafter on the indicators to be opened to public consultation.⁹

In their September 2007 meeting, the Committee of Ministers of the Council of Europe also adopted a number of recommendations for EU Member States concerning digital content (Council of Europe, Committee of Ministers, 2007b). The main goal of the Recommendation is to promote freedom of expression and information in the new media environment. It is meant to provide guidance—for developing data collection and storage standards; providing equal access; and labeling of potentially harmful content.¹⁰ The document calls for the private sector and Member States to strike a fair balance between “the right to express freely and to impart information in this new environment and respect for human dignity and the rights of others.” It also suggests that “the right to freedom of expression may be subject to formalities, conditions and restrictions in order to ensure proportionality.” The Recommendation encountered a variety of reactions. European Digital Rights (EDRI), for one, heavily criticized the Recommendation and campaigned against it on the grounds that it promoted self-regulation and soft legal instruments, leaving too broad a space for business-friendly interpretations (EDRI, 2007).

The new AVMS Directive has been transposed into national regulation between the end of 2007 and 2009, and the national questions and issues to arise from thereafter remain to be seen. As it is, like its precursor TVWF Directive, the new AVMS Directive falls short of directly addressing media pluralism and freedom of expression, and it

mostly deals with new advertising rules to apply. During the lengthy process of crafting the new directive, the European Parliament and a number of civil society organizations (such as consumer groups or independent media organizations) argued in favor of a stricter regulatory framework for safeguarding pluralism and freedom of expression. The final document makes a cursory reference to protecting media pluralism and freedom of expression, and it gives the mandate to national governments to guarantee the independence of national regulatory authorities.

2.3. Regulatory challenges in the new media environment: a few issues

As Klimkiewicz (2005) notes, EU audiovisual policy generally oscillates between supporting a common European media space by supporting large European media actors, and supporting pluralism and diversity. The rise of the information society poses further and fundamental challenges for policymakers at the EU level in relation to concepts such as pluralism and freedom of speech. The available regulatory scope of IS policies pertaining to media pluralism and freedom of speech (e.g. ownership regulations or universal service provisions) falls in large part under external pluralism. Content regulation—for the purposes of, for example, increasing diversity (and thus pluralism)—in the cases of early national radio and TV was simply a question of monitoring a predetermined amount of broadcast content. The volume of material was limited due to bandwidth and licensing restrictions, and thus many broadcasters operated under public service or quasi-public service provisions. Such provisions dissolve when applied to the Internet. The sheer volume of material online, coupled with the decentralized and de-territorialized production, distribution and exhibition nature of the Web, renders moot the traditional approaches to internal pluralism. Although some new media services (such as TV-like services) are subject to content regulation within the scope of the new AVMS Directive, the definitions of pluralism and freedom of expression in the EU IS rhetoric remain very basic and far from adequate in addressing the complexities inherent therein.

As Cooke (2006, pp. 366–367) discerns, the EU was much slower in addressing issues related to Internet content in the IS regulatory

framework. This was due to a lack of a supranational constitution and of other legally binding mechanisms, and due also to a wide variety of—often conflicted—positions and interests as voiced by various social actors. Content control also poses jurisdictional and cultural quandaries. Particularly problematic is the absence of supranational instruments to deter tendencies to interpret freedom of expression as a negative right at the national level. As Cooke observes, despite the problems inherent in regulating as large and unwieldy a medium as the Internet, the desire on the part of national governments, corporations, media companies, and individuals to monitor and regulate “harmful” or “offensive” media has led to “the adoption of a number of policy measures at institutional, national and international levels, with the expressed intention of monitoring and controlling access to, and dissemination of, such content” (2006, p. 362). As Karppinen (2006) notes, issues such as media pluralism, diversity, and free speech can be hijacked at the national level for ulterior political motives, and “the values and meanings associated with pluralism and diversity are open-ended and subject to continuous process of social negation” (2006, p. 64).

As an example of the fluidity of concepts such as diversity and freedom of speech, in early 2006 a newspaper (*SD-Kuriren*) linked to a Swedish right-wing nationalist party posted copies (to its online edition) of the controversial Danish cartoons of the prophet Mohammed. The host carrying the site, Levonline, after being contacted by representatives of the Swedish State Department and the Swedish secret police, decided to remove the site. Both the State Department and the secret police denied issuing a direct order to Levonline to remove the pages in question, but did point out to the host that the presence of the cartoons could prove a security risk, particularly to Swedish interests abroad. Sweden’s foreign minister at the time, Laila Freivalds, suggested that the cartoons constituted a form of hate speech, but that particular reason was not given for the deletion of the pages, and a number of legal scholars in Sweden had concluded that the cartoons had not, in fact, constituted hate speech. The controversy around the case led Laila Freivalds to resign on the grounds that, as a minister, she obstructed freedom of the press (SVD, 2006b). A hate speech charge was filed against the newspaper, but it was deemed unfounded by the Swedish attorney general (SVD, 2006a). In a similar case involving an EU candidate state, the Turkish courts shut down access to the

video-sharing site YouTube for 48 hours following the posting of videos (from users in Greece) with content suggesting that the founder of the Turkish Republic, and Turkish citizens in general, were homosexuals (The Guardian, 2007). The clips were deemed to have violated Article 301 of the Turkish Penal Code, under which it is illegal to insult either the memory of Atatürk, or Turkishness. As these cases illustrate (within EU-member and candidate contexts), legal and non-legal perceptions of “harmful” or “offensive” content can vary.

Since the definition of what is considered harmful content depends on the cultural traditions and moral beliefs of users, the variety of what is considered harmful content is “limitless.” The EU was aware that such wide variations make it impossible to formulate a common regulatory framework without infringing the fundamental right to freedom of expression of some groups. The European Parliament discussions, as well as the Commission documents, promoted self-regulation as being able to adapt to the different needs and act across legal and cultural traditions. The EU, however, refrained from pointing out how self-regulation could actually bridge the different cultural and legal traditions (Bonnici & de Vey Mestdagh, 2005, p. 136).

The problems illustrated by the Swedish and Turkish cases point to the need for a reconsideration of binding mechanisms to foster freedom of expression as a positive right. Halpin and Simpson (2002) make a similar observation when they write that the EU’s approach to Internet governance is “mixed” and that “its provisions are loosely specified giving considerable discretion to Member States” (2002, p. 288).

Although the European Parliament has tried to sustain a normative scope for public interest goals, the Commission, especially the current Directorate General Information Society and Media under Commissioner Viviane Reding, is inclined to equate media pluralism with a liberal market consisting of multiple economic actors and freedom of expression with mere access to the medium (through provision of physical access and media literacy). The overall approach to Internet regulation is described by Cooke (2007) as “multi-faceted” and one in which legal instruments, the “shaping of technical architecture” (e.g. the promotion of filtering software), the “manipulation of cultural norms” (e.g. through educational initiatives), and, finally, self-regulatory mechanisms are all used (2007, pp. 371–372). In terms of Internet content in particular, self-regulation by industry actors stands out as the dominant

regulatory instrument favored by the Commission. Yet the use of market-driven regulation and/or self-regulation is, in and of itself, a contentious issue. At the most fundamental level, the critique of such regulation is that it presumes a form of “market neutrality” through which competition simply “produces” pluralism, choice, diversity, freedom of speech, and so on. Such an assumption neglects the fact that, as Karpinen (2006) writes, “the market itself is a politically designed institution, not a homogenous, unstructured and unregulated natural entity,” and that “the actual shape of the markets must always be crafted by political and legal regulation and it hardly emerges spontaneously as a neutral mediator of civil society” (2006, p. 63).

Factors that determine the shape and content of new media landscapes are mutually constituted by structural factors on the one hand (production and distribution practices; architecture of technologies; policy and regulation) and user practices on the other, and access-related issues become more complex. Van Cuilenburg and McQuail (2003), among others, address how freedom of communication and/or expression is linked, crucially, to questions of access:

“The concept of ‘access to communications’ applies to structure, content and audiences and it can in general be defined as the possibility for individuals, groups of individuals, organizations and institutions to share society’s communications resources; that is, to participate in the market of distribution services (communications infrastructure and transport), and in the market of content and communication services, both as senders and receivers. Freedom of communication and free and equal access are related to the question of who is in control of the actual communication process.” (2003, p. 204)

As they note, access needs to be defined, “in terms of both being able to receive and send” information (2003, p. 204). Linked to this is a need to understand freedom of speech and freedom of expression as key sites for what Balkin (2004) describes as “struggles over the legal and constitutional protection of capital in the information age” (2004, p. 3). As he suggests, the “digital revolution” that defines the information society forces us to reconsider some fundamental assumptions about the organization and practice of free speech. Balkin identifies four shifts effected by the digital revolution. First, it lowers the cost of copying and

distributing information. Second, cross-cultural and international communication becomes much easier. Third, digital technology lowers the costs of “innovating with existing information” and building upon it. And fourth, “lowering the costs of transmission, distribution, appropriation, and alteration of information democratizes speech” (2004, pp. 6–9). This reconfiguration of free speech in the digital age, Balkin continues, has led to two trends: Digital content has become more “democratized,” and it has become a source of wealth and power.

These trends quickly come into conflict. That conflict, and its consequences for freedom of speech, is the central problem of the digital age. The irony is this: The very same features of the digital age that empower ordinary individuals also lead businesses continually to expand markets for intellectual property and digital content. Yet as businesses do so, they must deal with features of the digital age that empower consumers and give them new abilities to copy, distribute, and manipulate digital content (2004, p. 13). Balkin further argues that at the very moment when ordinary people are empowered to use digital technologies to speak, to create, to participate in the creation of culture, and to distribute their ideas and innovations around the world, businesses are working as hard as possible to limit and shut down forms of participation and innovation that are inconsistent with their economic interests (2004, p. 14).

The struggle that Balkin illustrates—between the rights of individuals to communicate freely in a new digital environment and the interests of commercial organizations—is emblematic of the contested stakes raised around media pluralism and freedom of expression in the EU information society context.

2.4. Conclusion

In the current phase of IS policy, which van Cuilenburg and McQuail (2003) call the “third phase” in media policy paradigm shifts, the EU leaned toward regulation favoring the interests of businesses and markets over the public and citizens. The Commission’s approach to questions of media pluralism and freedom of expression is marked more by caution than vigor. And the convergence of cultural policies and media/communications policies with competition policies

motivates national governments to prioritize the latter rather than safeguarding a public interest approach to the former. IS technologies at large, and particularly the Internet, constitute a significant terrain into which communications of all sorts—public/private, commercial/informative—increasingly migrate. As such, safeguarding media pluralism and freedom of speech in this terrain translates into safeguarding the well-being of the public sphere. Media pluralism is a strength, to the extent that it contributes to communicative democratic practices and where the “publicness” of the public is granted. When it is taken to mean, in a neoliberal, market-friendly framework, the plurality of available commercial actors in the market—with the hope that the multiplicity of actors will amount to diversity and plurality of voices—it becomes a weakness. In the EU, the coexistence of a competitive single market *with* public interest concerns and priorities calls not only for an effective convergence of technological infrastructures and regulatory policies, but also for a convergence of minds across the region around common normative grounds.

NOTES

¹ It should also be noted that the exaggerated emphasis placed on the primacy and immediacy of convergence—and hence the necessity to include broadcasting in the domain of competition-based ICT policies—during Bange-mann’s tenure at the Directorate General Information Society was later balanced by a more careful, evolutionary approach by the Commission.

² It is noted here that “Developments here depend mainly on private sector funding. Such activity may be supported with European funding, but much depends on action by Member States” (European Commission, 2000c, p. 2).

³ Community law currently treats “broadcasting services” and “information society services” as separate. The former refers to a program transmitted to the receiver (push) in the form of free-to-air or pay TV. The latter involves content accessed (pull) by the user.

⁴ See Sarikakis, 2005; Harcourt, 2005.

⁵ There are a number of key legislations at various institutional levels in play, such as the European Convention on Human Rights, Article 10 and Article 11 of the Charter of Fundamental Rights that safeguard freedom of expression.

⁶ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) O. J. 24.04. 2002, L

108; Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) O. J. 24.04.2002, L 108; Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of electronic communications networks and associated facilities (Access Directive) O. J. 24.04. 2002, L 108; Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) O.J. 24.04.2002, L 108; Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) O.J. 31.07.2002, L 201. Added to these was the regulatory framework for radio spectrum policy.

⁷ For further information on the list of actions between 2005 and 2007, see Commission Staff Working Document accompanying document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *i2010—Annual Information Society Report 2007*, SEC 2007, p. 395.

⁸ Article 23 reads: "Fostering pluralism, cultural identity and linguistic diversity in the digital space. Promoting digitisation, the creation of accessible digital content, and wide and cross-national access to digital information and cultural heritage in support of European integration. Fostering multilingual and local content throughout Europe, as well as European values of freedom, tolerance, equality, solidarity and democracy. ICT innovation and good practice exchanges at all levels are important means to achieve this" (Ministerial Declaration, June 11, Riga, Latvia).

⁹ The indicators are policies and legal instruments that support pluralism in Member States; the range of media available to citizens in different Member States; and the supply-side indicators on the economics of the media.

¹⁰ The Recommendations point to the public service aspect of the Internet. Guideline IV reads: "Access to the new information and communications environment facilitates the exercise of their rights and freedoms, in particular their participation in public life and democratic processes." Member States are encouraged to safeguard these rights and freedoms by providing public access to the Internet; ensuring provision and transparency of online services of public institutions; and, by providing online public services in a variety of languages.

CHAPTER 3

From Media Policy to Integrated Communications Policy:

How to Apply the Paradigm Shift on a European and National Level

HALLIKI HARRO-LOIT

A media policy paradigm has shifted from a media to a communication-oriented approach. At the same time the modern information environment requires different communicative competences from everyone. A comparison between EU communication and education policies reveals common elements, referring mostly to the individual's ability to seek, choose, process, analyze, and evaluate the information he or she needs.

The aim of this study is to propose a new integrated communications policy model and to discuss how this model would help the media better perform as a cultural service for society and democracy. Although the EU policy documents use different concepts and expressions (media literacy/communication skills or competences; consumers/citizens), the mutual objective is the individual's ability to make conscious choices and process information in the modern communication environment.

Small media markets (like the Baltic countries) are more vulnerable to the liberal market-oriented media policy trend, in which consumer needs are better served than citizen needs. Therefore it is important to merge the communication and education policy into one integrated concept when it is implemented on a national level.

3.1. A new communications policy paradigm: the liberal approach balanced by a literate individual

Since the 1980s the old normative media policies have been challenged, and policymakers are searching for a new communications policy paradigm. Mainly due to technological and economic convergence,

separate media and telecommunications policies lean towards an integrated communications policy. There seems to be a shift in values: Generally policy has to follow the logic of the marketplace, technology, and the wishes of consumers rather than impose its goals (van Cuilenburg and McQuail, 2003, pp. 181, 200, 201). New communications technology clearly puts more choices in the hands of the individual user. At the same time, a crucial question is whether the “consumer” or “customer” is taking over from the “citizen” in the communications sector. The consumer interest is and will continue to be interpreted narrowly in terms of price, choice, and value for money, thus legitimating the economic model of regulation. Most academics concerned with media policy (Livingstone and Lunt, 2007, referring to the studies completed by Murdock and Golding 1989, Graham 1999, Hamelink 2003) agree that access to information and communication resources is fundamental for an informed citizenry and a prerequisite for democratic participation (Livingstone and Lunt 2007, pp. 53, 62–63). Van Cuilenburg and McQuail (2003) propose three concepts that are central to any new communications policy model: freedom of communication, access, and control/accountability. “Freedom of communication and free and equal access are related to the question of who is in control of the actual communication process [...] Access has to be understood both in terms of being able to receive and to send” (van Cuilenburg and McQuail, 2003, p. 204).

On February 1, 2006, the Commission of the European Communities adopted a White Paper on a European Communication Policy. According to this document, any successful EU communications policy must be centered on citizens’ needs (European Commission, 2006a). It should therefore focus on providing the tools and facilities—the forums for debate and the channels of public communication—that will give as many people as possible access to information and the opportunity to make their voice heard. Future work in this area could aim at three main objectives (p. 6):

- improving civic education;
- connecting citizens with each other;
- connecting citizens and public institutions.

On December 19, 2007, the Audiovisual Media Service Directive (AVMSD; Directive 2007/65/EC) entered into force (European Parliament and the Council, 2007). The Directive reaffirms the European audiovisual model, but among other new trends it provides more flexible rules on TV advertising to better finance audiovisual content and suggests low barriers to entry as the basic principles of the internal market. One counterbalance to the market liberalization ideology should be media literacy and self- and co-regulation of the media sector. Section 37 of the AVMSD says that “media literacy” refers to skills, knowledge, and understanding that allow *consumers* (emphasis added—H.HL.) to use media effectively and safely, exercise informed choices, and protect themselves from harmful material. The development of media literacy in all sections of society should be promoted.

3.2. EU policy on media literacy in the context of key competences and communications policy

In order to achieve the strategic goals for the European Union (“to become the most competitive and dynamic knowledge-based economy in the world...”—Lisbon European Council 2000), the European Commission has identified “eight key competences for lifelong learning”¹ (European Commission—DG Education and Culture, 2004). On December 18, 2006, the document was accepted by the European Parliament. Communication competences are crucial and are related to critical thinking, high-level information management skills, and well-developed communication skills. These competences are a prerequisite for a satisfactory personal performance in life, work, and subsequent learning. They include the ability to read and understand different texts for various purposes; the ability to search, collect and process written information, data, and concepts in order to use them in study and organize knowledge in a systematic way; and the ability to distinguish, in listening, speaking, reading, and writing, relevant from irrelevant information. (European Commission—DG Education and Culture, 2004, p. 9).

The aforementioned “eight key competences” and media policy presume that knowledgeable choices made by the individual (versus the paternalistic model) are supported by media-literacy education developed around the world, mainly since the 1990s. The European

Commission has a Web-page section on media literacy that provides a definition that corresponds to a great extent with the communications policy model proposed by van Cuilenburg and McQuail (2003). The definition on the EU Commission Web page is the following:

“Media literacy can be defined as the ability to access, analyze and evaluate the power of images, sounds and messages which are now being confronted with on a daily basis and are an important part of our contemporary culture, as well as communicating completely in media available on a personal basis... The aim of media literacy is to increase awareness of the many forms of media messages encountered in their everyday lives. It should help citizens to recognize how the media filter their perceptions and beliefs, shape popular culture and influence personal choices. It should empower them with critical thinking and creative problem-solving skills to make them judicious consumers and producers of information. Media Education is part of the basic entitlement of every citizen [...] Today Media Literacy is one of the key pre-requisites for active and full citizenship.”²

Hence, the concept of media literacy (media education) is part of this multifunctional package of knowledge, skills, and attitudes that was expressed in the “Key Competences” document.

In 2006 the European Commission launched an EU-wide survey on best practices on media literacy in the digital age. The Commission’s intention is to eventually adopt a Communication on Media Literacy in order to establish grounds for European policy on Media Literacy. The far-reaching aim is to add a further building block to European audiovisual policy under the overall 2010 initiative.

3.3. New communications policy and liberalization at use: the case of the Baltic states

The relationship between the size and wealth of a media market and the level of resources available for the provision of media has clear implications for pluralism and media policy. The Baltic media markets are small (the Lithuanian and Estonian media markets are among the smallest in Europe, with potential audiences of 3.4 million and 1.37

million, respectively). Media policies are generally liberal in the region: None of the three Baltic countries has a law on cross-media ownership, strict rules on political advertising do not exist, and damages awarded for injuries to feelings and reputations are modest. Monitoring of commercial broadcasters and enforcing fulfillment of their legal and license obligations is different in the Baltic states. In Estonia, the Ministry of Culture, as the regulatory body for broadcasting, focuses mainly on fulfillment of the rules for advertising quotas, frequently ordering measurements from TNS EMOR. Regular monitoring of the programming issues—concerning, for example, the right of reply, product placement of sponsors, fair conduct prescribed by the Broadcasting Act, and fulfillment of other responsibilities of the executive producers—has been rare, performed ad hoc in the course of receiving complaints. In Lithuania, the broadcasting sector is monitored by different institutions (Inspector of Journalist Ethics, Radio and Television Commission), and these institutions also enjoy competences to impose fines. Cases may concern advertising content or placement of advertising in the programs, but very often other cases are also evaluated, such as protection of minors against the detrimental effects of public information or matters related to dignity or honor. In 2003 the Code of Administrative Violations was enforced, and the Monitoring Center was created in Latvia. This center analyzes the content of the one-day output of three television channels and two radio channels (Open Society Institute, 2005, pp. 976–977).

The liberal media policy creates a dichotomous situation. On the one hand, market-oriented media policy opens an unrestricted arena for media development. An over-fragmented industry and the lack of legal barriers against concentration limit resources to produce the content that meets the minimum quality standards for information in a democratic state. On the other hand, liberal regulation and the virtual absence of state intervention in the matters of mass media create favorable conditions for market-oriented logic to proliferate (Balčytienė and Harro-Loit, forthcoming).

This market-oriented approach is most transparent in broadcasting policy. As the private broadcasters in the Baltic states (especially in Latvia and Lithuania) have few legal obligations regarding public service remit, the public broadcasting program is vitally important for citizen information (Open Society Institute, 2005). In Estonia the complete

removal of advertising from the schedules of the public service broadcasting (TV in 1998 and radio in 2005) helped to make the program more appropriate for the needs of different groups in society. Nevertheless, the funding of public broadcasting has lacked stability and sufficiency. Latvian and Lithuanian public broadcasting are funded by state subsidy and advertising. As there is no precise definition in Lithuanian law on how to determine the level of the state subsidy, the public broadcasters have balanced fulfillment of their public service mission against attempts to maximize ratings in prime time (Open Society Institute, 2005, pp. 985–986, 1042, 1065). In Lithuania and Estonia there has not been serious political interference compromising the editorial independence of public broadcasting. However, in Latvia the National Radio and Television Council has not acted to defend public media against political pressure (Open Society Institute, 2005, p. 979).

The crucial question of whether the “consumer” or “customer” is taking over from the “citizen” is linked with the question of whether it is possible to give the public broadcasting service greater legitimacy in the media landscape. Hence, while the general EU policy is oriented towards liberalization and free competition, it is reasonable to keep the main goal of communications policy—“empowerment of an individual”—and support the regulation that guarantees the public sector media activities.

The communications policy that guarantees access to the Internet has been especially efficient in Estonia. The rapid increase in Internet usage since the end of the 1990s is related to several factors, such as government initiatives, liberalization of the telecommunications market (foreign investments, increasing competition, and decreasing prices), and the development of e-banking. All government institutions were pooled into one e-government services portal (<http://www.riik.ee>) in 1998, and in 2004 the e-citizen project was implemented. Under government and NGO initiatives, the Internet was made accessible for segments of the population that are of little interest to commercial vendors—the focus has been on schools and rural areas. *Tügrihüpe* (Tiger’s Leap), Estonia’s IT program, has provided computers and software for schools and helped to connect all the schools nationwide to the Internet. Since 2001, competition in the Estonian telecommunications market increased, resulting in a drop in consumer prices for Internet access.³ The low cost in Estonia enabled a critical mass of Estonian

citizens to get Internet access, especially at home, and Internet banking already started in 1996. Frequent Internet users in Estonia enjoy various advantages; Internet communication (especially among young people) is multifunctional. It has been used for services, interpersonal communication, and information searches.

The well-orchestrated decisions and investments had far-reaching results. The number of those in Estonia using the Internet frequently (daily, or a few times per week) gradually increased. Sixty-five percent of the population (768,000 inhabitants) uses the Internet. Every second person between the ages of 6 and 74 uses the Internet at least five days per week. In Latvia, 48 percent of the population (between 15 and 74) has used the Internet sometime in the last six months; in Lithuania 37 percent; in Estonia 63 percent (EMOR, 2008). The number of Internet users in Estonia gradually increased more than four times from 2002 to 2006. Latvia and Lithuania, which previously had lower Internet access and expansion of use than Estonia, are now developing rapidly in this area and approaching the levels of their Baltic neighbor.

3.4. Education policy implementation on media literacy and communications skills—reflected in the national curricula

Unlike media policy, media literacy and communications competences are fairly recent policy issues. Several of the central issues have been addressed since the 1980s, but the movement has received increased support in recent years (Yates, 2004). According to Lemmen (2005), EU Member States already have substantial media education activity; the Scandinavian countries, the United Kingdom, the Netherlands, and Hungary provide positive examples. Structures for implementation of media education in schools differ from one country to the next, depending on the priorities of the government and funding. The United Kingdom, for example, has gone through a considerable public policy debate over the nature of skills and abilities needed to navigate through today's information society. In Baltic countries, media literacy has only recently started to develop as a policy issue. There are no policy documents that give legitimacy to media literacy either as a substantial part of citizens' education or as a national communications policy.

One reason that might create problems in this area is the diffusive nature of the subject. Media education varies widely across Europe, not only in terms of its terminology—the most common versions including media education, media literacy, information literacy, moving image education—but also in terms of its implementation (Lemmen, 2005). Media literacy can be implemented in national curricula as a cross-curricular objective/theme or can be handled as a separate school subject. Media literacy competences could be used in programs designed to promote health or citizens' education (production of a film or article, analysis of different types of text on health, or publishing a school newspaper) or could be more narrowly oriented to the training of critical information seeking and processing abilities (critical thinking). The goal of media education could also provide a grounding upon which students can better develop their own idiosyncratic responses (Kubey, 2005).

A broader agreement has been generated around the fact that communication skills are not limited to one specific field, but include more general competences (Reid and Scott, 2005, p. 183). Given this diversity of definitions in the literature, it remains an open question whether a media literacy concept includes communicative skills that empower individuals to seek, choose, analyze, evaluate, and create information (different types of texts), or whether it is the communication ability that encompasses "media literacy."

In Estonia media literacy and computer competency, as well as safety, environment, and career planning are cross-curricular themes (National Curricula, hereafter abbreviated as RÕK, Estonian Ministry of Education, 2002, para. 10, section 4). Media education could also be seen as a special subject (one can finish a secondary school by taking this as a final exam, after completion of a 105-hour course). The content of this special course is not strictly regulated and can therefore be freely created by the teacher. In addition, certain sub-topics are written into the national curricula of specific subjects (e.g. introduction to the journalistic genres in the Estonian language curriculum; advertising, manipulation and source analysis in social science class).

The communication competence is defined as a key competence: "Ability to understand, memorize, spread, interpret and create texts via language. Generally it is the ability to communicate in different situations in writing and orally" (RÕK, 2002). This definition partly

overlaps the internationally accepted (EU Commission) definition of media literacy, except for the critical thinking and reading abilities. Little documented material is available on how these competences should be taught in the classroom (methodologically) and what resources would be needed. In other words, the concept of media literacy (or a communications competence) is vague and unfeasible, unless the school is motivated to develop a more focused approach. The vagueness of the concept becomes apparent when we analyze the level of generalization. For example, the national curriculum requires that children be able, by Grades 4 to 6, to distinguish between fact and opinion. Unlike the EU policy paper on “8 key competences,” the national curriculum does not provide the elements of knowledge, skills, and attitudes to afford the application of this very concrete skill in different classes. In order to distinguish a fact from an opinion in history documents or news stories, children should acquire the ability to “read and understand different texts” and “adopt strategies appropriate to various reading purposes” (European Commission—DG Education and Culture, 2004, p. 9)

Another requirement is that the child “should be able to seek information from various channels, interpret, use and spread information” (RÕK, 2002, para. 19, sections 15–17). The methodologically crucial questions, such as: What the different channels are, how to distinguish between discourse or text types, etc., are being left uncertain.

Without clearly defined concepts of communications competences and media literacy, the whole communications policy shift on a national level remains bound in ambiguities. It is a vicious circle: a successful integration of media education into the initial teacher training depends on the infrastructure, the context and the curriculum (Lemmen, 2005). In Estonia the teachers’ training has been hectic (as well as the curriculum), most of these projects have been initiated by various non-profit organizations (Integration Foundation, “Tiigrihüpe”; Open Estonian Foundation). Textbooks are oriented to special media classes/courses and less to a cross-curricular approach. The textbooks (Estonian language and literature, social sciences) that include media-related topics are mostly theme-oriented (advertising, news) rather than focused on training of communication competences.

In 2005–2006, the interdisciplinary group of researchers at the University of Tartu proposed an idea to develop and communicate

the concept of cross-curricularity: the possibility to train key competences as well as to develop integration between separate subjects. The concept of media literacy and communication competences was integrated and contextualized as a substantive part of citizens' education. Due to national political upheaval, the new curriculum was not implemented. Thus the biggest barrier to the implementation of the advanced media literacy and communications skills concept rests with the lack of political will and decisions concerning citizen education in an information society.

In Latvia the reform of the national curriculum in 1998 did not include a media education concept; the emphasis is on the interpersonal communication competences.⁴

In Lithuania, in 2002 a law was passed on the protection of minors against the detrimental effect of mass media, indicating responsibilities and accountability of information providers (editors, journalists) in all mass media including the Internet. The program on media and information literacy education (entitled "An actual programme about teaching on provision of public information and human rights for school children of Grades 9–10–11") was prepared according to the decision by the Seimas (the Lithuanian Parliament) related to the annual report of 2003 by the Inspector of Journalists' Ethics. The program (project) was initially implemented in 2005 and concluded in 2008. Its goal was to teach students information literacy skills, to stimulate critical thinking and to educate children to use new IT as well as other media-related products. The program also aimed to teach children to use new information products of the knowledge age as well as adequately assess these products to fit individual as well as social needs. The program has been implemented by the Ministry of Science and Education of the Republic of Lithuania, the Office of Inspector of Journalists' Ethics, the Ethics Commission of Journalists and Publishers as well as NGOs. The project was carried out in phases. From 2005 to 2006: it was designed, and from 2006 to 2008 were held public events, increasing knowledge of and support for program goals. The program has been financed from the state budget, as well as public and private funds, with a budget of approximately 700,000 litas (€ 202,734) (Balčytienė Aukse, 2007).⁵

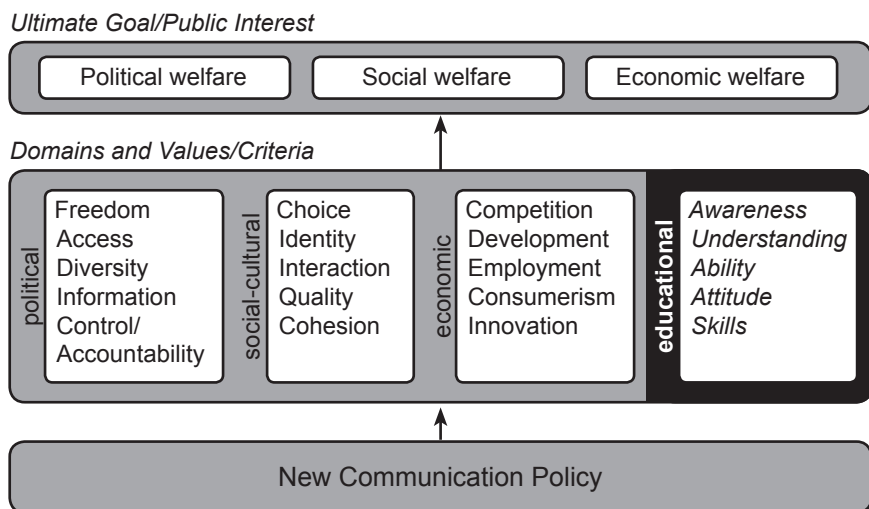
This description reveals that the implementation of media literacy in the three Baltic states is in different phases, and the approach

is different. The Latvian and Estonian approach is more oriented towards an improvement of the national curriculum, while only the Estonian national curriculum encompasses both media and communication literacy approaches. Lithuania is developing project-based ideas. The Estonian experience has been long enough (since 2002) to discover weak sides of the concept as well as the problems of implementation in everyday practice.

3.5. Integrated communications policy

As contemporary communications policy depends not only on *normative media* and *telecommunications regulation* (embodied in statutory regulation, self-regulation, and market) but also on the *social and communication competences of each individual*, it would be reasonable to link the communications and education policies. The shift from regulating media organizations, ownership, and content towards “empowering the citizen” and “promoting civic competences” needs to be discussed thoroughly, preferably at a national level, as policy implementation takes place in the national sphere.

Figure 3.1. An extended new communications policy paradigm



The new communications policy paradigm that was proposed by van Cuilenburg and McQuail (2003) could be extended towards an integrated communications policy. According to McQuail and van Cuilenburg, a general goal of policy is to serve the public interest; economic welfare has risen in comparison with political welfare, and social welfare has been redefined. While defining new policy paradigm (media policy + telecommunications policy = integrated communications policy), van Cuilenburg and McQuail define three domains and values (criteria): political domain, social-cultural domain, economic domain. I propose to add a fourth: educational domain. The criteria for the educational domain would be knowledge (awareness and understanding), skills (abilities) and attitudes.

Given that education policy is part of a new communications policy, the answer to the question “What form of control can or should be applied to conduct or content (in the public interest)?” could be more balanced towards the interests and needs of the individual and certain social groups.

Table 3.1. Value and criteria framework for the new communications policy model

Domains and Values/Criteria			
POLITICAL	SOCIAL-CULTURAL	ECONOMIC	EDUCATIONAL
freedom	choice	competition	awareness
access	identity	development	understanding
diversity	interaction	employment	ability
information	quality	consumerism	attitude
control account-ability	cohesion	innovation	skills

A crucial aim of media literacy is to increase *awareness* of the many forms of media messages and discourses to which individuals have access. *Understanding* criteria provides real access to the information. For example, mere technical access to the Internet would not help people to get the information they need. The critical reading/viewing *ability*,

as well as an *ability* to distinguish, choose, and process information and formulate one's arguments, are prerequisites to achieve the goal of a balance between the political and social domain criteria and the economic domain criteria. It is finally an *attitude* that distinguishes consumers from citizens, especially in circumstances where diversity and choice are basic values of communications policy. In order to send and receive information, certain *skills* are needed. It is not enough to give power to the consumers. In order to support citizens and a democratic information order, people need more sophisticated tools for conscious decisions.

3.6. Conclusion

My proposed new integrated communications policy model includes the educational domain as a prerequisite for an EU media policy that would make the citizen its central focus. The political tools (documents) for integrating communications policy and education policy are available at the EU level, although expressed in different documents that belong to different policy domains. However, the implementation of these policy lines occurs at the national level, and thus synergy-building needs a special effort: an interministerial and interdisciplinary collaboration, as well as changes in the national curricula. The task of the integrated policy model is to recognize those factors in different domains that support each other.

Small media markets share specific conditions: the total resources available for media provision might be smaller than those available for a minority in large communication markets. Under these circumstances, a different conceptualization of communications policy is needed. The diversity of a media content production is more vulnerable than access to receiving and sending information. The public broadcasting sector has a significant role to play in the development of content diversity. In the Estonian experience, a public broadcasting program without advertising increases the choice and quality criteria. In addition, public broadcasting could promote media literacy along with the education system.

NOTES

¹ The eight domains of key competences are: 1) communication in one's mother tongue; 2) communication in foreign languages; 3) competences in math, science, and technology; 4) digital competence; 5) learning to learn; 6) interpersonal, intercultural, and social competences, and civic competence; 7) entrepreneurship; 8) cultural expression. Communication skills are generally developed through different subject areas: first, second, fourth, fifth. The definition of digital competence involves the confident and critical use of electronic media for work, leisure and communication. These competences are related to logical and critical thinking, to high-level information management skills, and to well-developed communication skills.

² http://ec.europa.eu/avpolicy/media_literacy; retrieved January 27, 2008.

³ According to the Estonian business paper *Äripäev*, in 2001, the monthly ADSL Internet connection prices in the Baltic states were as follows (the prices were calculated from the national exchange rate of 1 Estonian kroon = €15.65): €38 in Estonia (Estonian Telephone), €50.70 in Latvia (Lattellekom), and €50.45 in Lithuania (Lietuvas Telekomas).

⁴ <http://isec.gov.lv/en/standards.shtml>; retrieved January 27, 2008.

⁵ An e-mail interview conducted with Balčytiene Aukse on October 17, 2007.

CHAPTER 4

New Media Legislation:

Methods of Implementing Rules Relating to On-Demand Services

ÉVA SIMON

The European Parliament adopted the Audiovisual Media Services Directive (AVMSD) in December 2007 (European Parliament and the Council, 2007). In this chapter I examine how the Audiovisual Media Services Directive handles new technological innovations. After a brief examination of the text of the Directive, I focus on the potential implementations of the rules concerning on-demand services. I examine the regulatory methods offered by the AVMSD from the viewpoint of East European Member States.

4.1. Audiovisual Media Services Directive

The AVMSD was adopted after a two-year debate, amending the Television without Frontiers Directive (European Parliament and the Council, 1997) in December 2007. Member States had to implement the Directive in their national regulatory regimes by the end of 2009. The AVMSD only sets up a regulatory framework; therefore each member state is obliged to formulate concrete media market regulations. To sum up the basis of the new regulatory framework: the EU created a common “minimum regulation”¹ with regard to television broadcasting services² and on-demand services.³ While stricter rules continue to apply for television broadcasting services, special on-demand service regulations⁴ also appear in the AVMSD. The other major reform is lighter regulation of advertising rules in broadcasting, providing more flexibility in light of new advertising techniques. In what follows I will focus on on-demand services.

4.2. Principles of media regulation

When regulating media, regulators cannot disregard the fact that technology is rapidly changing. The objective of rules of law and legal systems is stability; consequently, they are only able to regulate, with due circumspection, circumstances that emerge *en masse*. Accordingly, there are two possible methods of regulation: Legislators either try to regulate expected conditions in advance, through *ex ante* regulation, or wait for the processes to develop and regulate them afterwards, through *ex post* regulation. In the case of the media and information society, especially areas deeply affected by technology and innovations, *ex ante* regulation can stifle development. Conversely, due to the rapid change in technical solutions, *ex ante* regulation is possible only in a very limited sphere. *Ex ante* regulation is needed in asymmetric legal relations. For example, consumer protection is one of the main fields where *ex ante* regulation is necessary to protect consumers from inequitable situations vis-à-vis market players. While *ex ante* regulation creates a clear and transparent situation with all the drawbacks mentioned above, *ex post* regulation is reactive, with the legislator reacting to actual demands. As long as the market regulates itself properly, the legislator does not intervene. Ideally, even when it comes to intervention, the legislator intervenes only to the extent that is absolutely necessary.

Technological innovations and converging platforms are making it clear that regulation should be introduced independently from the various platforms: Services provided by interactive television, IP TV, and Joost⁵ represent frontiers where the various regulatory models overlap. The reality of converging services and platforms has led EU legislators onto a new path of regulation. Technology neutrality is one of the main goals of the common regulation of audiovisual media services. Nevertheless, technology neutrality is only one of several principles.

Reconciliation of the principle of technological neutrality is needed “with the principle of regulation ‘in context,’ and might require a certain degree of discretion for the regulator depending on the platform that is used. More generally, the principle of technological neutrality should not be regarded as an absolute, but rather act as a guiding principle, since there are still differences in technologies that need

to be recognized by regulators (for example, specific multiplex licensing, or the use of specific spectrum).” (Ariño, 2007)

Applying the principle of technological neutrality does not take into consideration that, in the case of content regulation, not only the transmission but also the consumption of content is important. Consumption of content is different on different platforms. The technological neutrality principle leaves out of consideration the potential of the consumer’s active decision-making in choosing both the tools and the way they access content.

Technological neutrality, although one of the main principles pursued by the AVMS Directive, is one of several principles. Moreover, the Directive does not see this principle as absolute but nuances it through the concept of graduated regulation (imposing lighter rules on non-linear services, where consumers are assumed to have greater control over content and access).

As specified in the AVMSD, the aim in modernizing the Television without Frontiers Directive was to create a consistent internal market framework for information society and media services. According to the preamble of the Directive, the updated media regulation aims to “stimulate economic growth and investment [...]. It is therefore (to avoid legal uncertainty) necessary, in order to avoid distortions of competition, to improve legal certainty, to help complete the internal market and to facilitate the emergence of a single information area” (European Parliament and the Council, 2007). The basic principles of the internal market named in the text—free competition and equal treatment—serve to ensure transparency and predictability in the market of audiovisual media services.

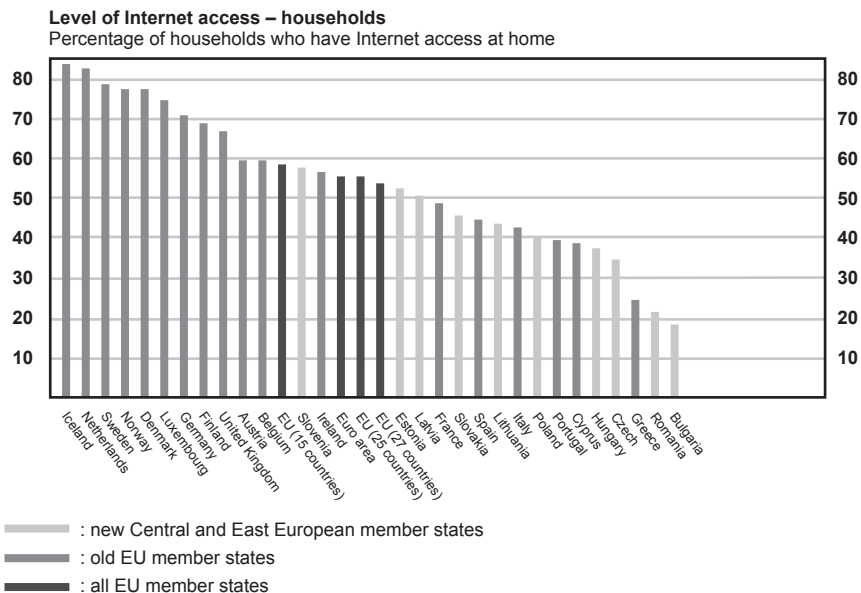
4.3. Reasons for regulation

As stated above, one of the main reasons for regulating the media is the scarcity of resources. Therefore television broadcasting has always been subject to much closer regulation compared to print and online media. However, with the digital switchover fast approaching and the growth of on-demand digital cable and online services, EU policy makers decided to regulate on-demand services partly as television broadcasting. The explanation can be found in the preamble of the AVMS

Directive: “It is characteristic of on-demand audiovisual media services that they are ‘television-like,’ i.e., they compete for the same audience as television broadcasts, and the nature and the means of access to the service would lead the user reasonably to expect regulatory protection within the scope of this Directive” (European Parliament and the Council, 2007).

What conclusion can be drawn from this? It can be inferred that the EU considers on-demand services rivals to television broadcasting. Even if this becomes true in the near future, at the moment on-demand is a developing field of information society services, with different features and a much lower degree of access than television. The following charts show Internet access and broadband Internet access in EU countries. According to 2007 statistics, new Central and East European member countries are remarkably backward in Internet usage compared to Western EU countries or in terms of EU averages.

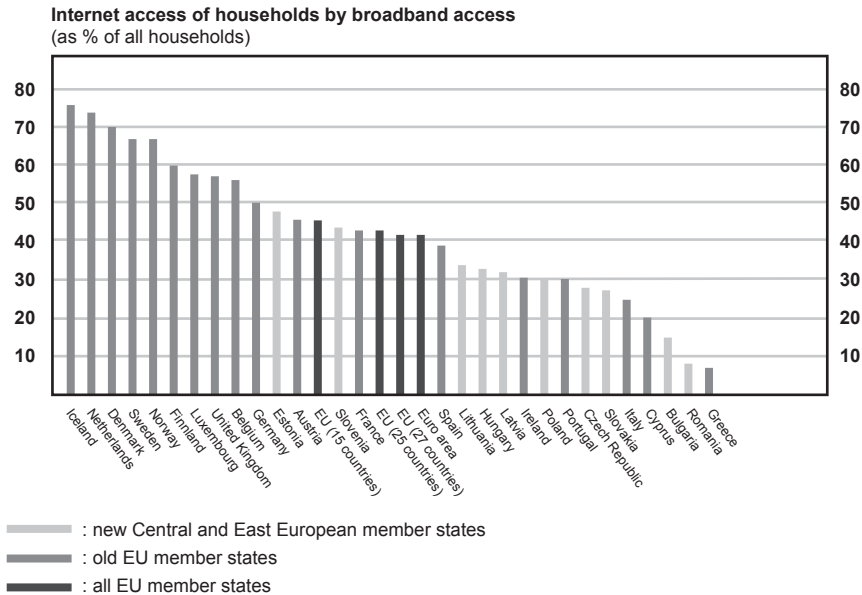
Figure 4.1. Level of Internet access—Households 2007
(population considered 16 to 74)



Source: Eurostat Graphics 2007 (© European Communities, 1995-2008)

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*Figure 4.2. Internet access of households by broadband access 2007
(population considered 16 to 74)*



Source: Eurostat Graphics 2007 (© European Communities, 1995-2008)

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The second chart shows broadband access, which is especially significant since on-demand services can only be conveniently accessed through large bandwidth.

E-Marketer research⁶ in the United States points out that “there is no correlation between US Internet users watching video online and a potential audience for television content delivered on the Internet. [...] Most of the evidence available suggests that online video content is supplementing and complementing traditional TV content and viewing habits rather than replacing or supplanting them.” The Cable and Telecommunications Association of Marketers⁷ notes that broadband video currently makes up less than 3 percent of the total video watched per week in the United States.⁸

Greater bandwidth and a higher percentage of households with Internet access will have an impact on the number of on-demand services and the amount of video accessed online. But the changes will be due to consumers’ need to control the content they access. However, the

notion of convergence seems to refer more to the distribution of content than forms of access or usage. As we have seen, there is little evidence of this, and therefore, for the time being, it is difficult to justify the EU's position linking television and on-demand services.

Diminishing resources and the day-by-day increase of new services could have led the EU to design a flexible and lighter regulatory framework. However, instead of deregulating the audiovisual media sector, the AVMSD extends the scope of regulation, bringing on-demand services under the same principle as television, with reference to "competition" and "rival services"—a questionable argument, as pointed out above.

4.4. Level of regulation

The AVMSD covers television broadcasting services and on-demand services, defining both common and separate rules for the two types of media services. The Directive sets out general rules and objectives, yet leaves the decision on how to implement the minimum standards to Member States. A close examination of the text suggests that the rules posed in the AVMSD can be classified into two main groups.

The first group of rules can be considered normative rules, containing obligatory regulation. The second group of rules are to be seen as recommendations or guidelines.⁹ The rules in the second group leave the form and the solution—whether to apply a code of laws, soft law solutions, or not to implement the guidelines at all—at the discretion of Member States. However, neither normative rules nor the guidelines exclude the opportunity for Member States to impose stricter rules under their jurisdiction, as long as the rules are consistent with the AVMSD and European Community law at large (European Parliament and the Council, 2007, para. 32).

Access to European works in on-demand services fall between the two groups. The preamble (European Parliament and the Council, 2007, para. 48) states that on-demand services "should, where practicable, promote the production and distribution of European works." This normative rule can be considered an empty rule. The word "practicable" and the obligation to "promote" put the solution in the hands of Member States to decide whether to apply quota regimes to

Table 4.1. Categories of rules under AVMSD

Rules belonging to the normative group	Rules belonging to the guideline group:
Audiovisual media services (both services)	
New definitions	Support co- and self-regulation
Rules on advertisements	Media literacy
“Country of origin” principle	Equal opportunity for disabled people
Information accessible for the recipients	Possible introduction of product placement
Prohibition of incitement to hatred	
Audiovisual commercial communications	
Copyright issues	
Only for linear services	
Access to European works	
Exclusive television broadcasting rights	
Only for on-demand services	
Harmful content	Protection of minors and human dignity
← Access to European works (on-demand) →	

on-demand services. Therefore quota requirements may be considered more as guidelines than as normative rules.

How, according to the AVMSD, should Member States implement rules on on-demand services? The European Commission, pointing to the directive, emphasizes that any regulation to be introduced should be decided upon only after careful analysis: “in particular whether legislation is preferable for the relevant sector and problem, or whether alternatives such as co-regulation¹⁰ or self regulation¹¹ should be considered. [...] this Directive encourages the use of co-regulation and self-regulation” (European Parliament and the Council, 2007, para. 36).

The Council of Europe, the Commission, and the Parliament have demonstrated at the European level the need for greater regulatory flexibility in the converged world. Starting with the online world years ago, due to fast-evolving technology, co- and self-regulatory mechanism were considered an effective and flexible regulatory method in

the field of media. Co- and self-regulatory regimes differ in EU states. Legislation and the attitude of market stakeholders towards state intervention are influenced by historical, political, and economical characteristics. According to research by the Hans-Bredow Institut (2006), conducted in 25 EU Member States, the level of co- and self-regulation is far less developed in new East European Member States.

There are several differences between self- and co-regulation. One of them is the initiation of the regulation. While self-regulation is based on market players' or other non-governmental stakeholders' own initiatives, co-regulation serves public policy goals, and therefore governmental organs take part in shaping co-regulatory systems and requirements from the beginning. There must be "some sort of connection between the non-state regulatory system and the state (though not necessarily a statutory one; contract will suffice), that some discretionary power is left to the non-state system, but that the state uses regulatory resources to guarantee the fulfilment of the regulatory goals" (Prosser 2008, p. 101). Co-regulation is typically initiated by the government, but allows for considerable industry autonomy under clearly defined parameters.

Self-regulation can only handle ethical questions under constitutional requirements across Europe. Fundamental rights and a set of non-negotiable standards must be ensured by legislation; however, these rights can be supported by complementary regulatory methods like co- and self-regulation. The scope of activities of self-regulatory bodies is limited, advertising and journalism being the two most self-regulated sectors in post-communist countries.¹² Co-regulation is used mostly in the fields of protection of minors, advertising, and technical standards. However, the absence of co-regulatory mechanisms is manifest in the media sector of post-communist countries. Unless either the law or stakeholders instigate co-regulation, attempts to shape lighter regulatory methods will fail in these countries. While in Germany, Great Britain, and the Netherlands, there are often-cited working models for co-regulation, the lack of governmental initiatives in post-communist countries holds back the prospect of new regulatory mechanisms. The decrease of state-dominated regulatory prototypes can reshape media legislation. To this end, both market players and government intentions have to change. Co-regulatory systems would entail significant changes for the various players, including both lawmakers

and market players. “Resulting regulatory norms would be a fusion of the two old dispensations and their application would be invigorated on both sides on account of relevant expertise being channelled into the attainment of common objectives” (McGonagle, 2002, p. 20). The lack of confidence of stakeholders—professionals, state representatives, authorities, and members of the public—lead to the failure of co-regulatory efforts. Therefore the attitude of the stakeholders has to be changed to ensure effective alternative regulatory methods in post-communist countries. In countries where co-regulation is missing, emphasis should be placed on establishing conditions for acceptable co-regulatory systems. In Britain a consultation was held seeking views on the criteria that Ofcom (Office of Communications) should use in promoting effective co- and self-regulation. This resulted in the publication of a statement in 2004 setting out the criteria to be applied by Ofcom.¹³ After four years, Ofcom launched a new consultation in March 2008 with the title “Initial Assessments of When to Adopt Self- or Co-Regulation.”

To make sure that post-communist countries can take the opportunity to apply lighter regulation, as offered by the AVMSD, they will have to elaborate the system, the requirements, and the implementation mechanism of co-regulation. Interaction among all interested parties, their equitable participation, operational autonomy, effective monitoring and compliance mechanisms, and flexible cooperation are safeguards for effective co-regulatory methods (McGonagle, 2002, p. 24). The implementation period is specified in two years, which is short. Therefore the implementation of the AVMSD is likely to be carried out using lighter regulatory methods where such methods already exist.

4.5. Relation between on-demand, television broadcasting, and information society services

On-demand services are audiovisual media services. There are overlapping areas with television broadcasting on the one hand and information society services on the other. These lines need to be clarified by Member States. In the course of long debates, the definition of on-demand services has been clarified; however, precision is still lacking.¹⁴ A number of strategically significant new media services potentially fall

within the scope of the definition of the Directive. During the implementation process, Member States will have to find exact measures for different services. In the age of convergence, both in the means of technology and services, one can see that different services can be provided on the same platform even by the same service provider. On Web sites one can find both edited content by the service provider and user-generated content. The differentiation between the types of services is far from obvious for the consumer.

According to the AVMSD, on-demand services are services that are mass media and that could have a clear impact on a significant proportion of the general public. Such services are primarily commercial, fall under the editorial responsibility of the service provider, and have as their principal purpose the provision of programs in order to inform, entertain, or educate the general public. All of these criteria need to be considered cumulatively.

There are several services named in the AVMSD as exceptions. These include e-mails sent to a limited number of recipients; electronic versions of newspapers and magazines; Web sites that contain audiovisual elements only in an ancillary manner, such as animated graphical elements, short advertising spots, or information related to a product or non-audiovisual service; games of chance involving a stake that represents a sum of money, including lotteries, betting and other forms of gambling services; and online games and search engines, but not broadcasts devoted to gambling or games of chance.

But do Web sites full of advertising spots fall under the directive? How about a travelers' guide with videos where an agency sells air tickets to Thailand? Does Joost compete for the same audience as the BBC? Can we consider Joost one service or a partly on-demand, partly information society service? What about new services appearing day by day on the Internet? What does principal purpose mean? How do we differentiate between commercial and primarily non-commercial services? The lines between information society services and on-demand services need to be clarified as comprehensively as the line between linear and on-demand services, as there are overlaps both ways.

All on-demand services are information society services (regulated by the E-Commerce Directive), but not all on-demand services are audiovisual media services. For those on-demand services that are covered by both the AVMSD and the E-Commerce Directive, primarily

AVMSD shall be applicable. In the event of a conflict between a provision of the E-Commerce Directive and the AVMSD, the provisions of the AVMSD shall prevail. At the national level, the regulation must take into account the already implemented e-commerce regulation to make sure that the overlapping rules are not in conflict.

Given the overlap with existing directives, we should examine whether the AVMSD introduces regulation for policy areas that have not sought to affect the market before. Releasing certain information publicly to customers has been regulated by the E-Commerce Directive for years and in more detail: It often forms part of general consumer-protection laws. Protection of minors and human dignity is already regulated by international treaties and the Council of Europe Convention on Human Rights, as well as under decency rules and criminal and civil laws of Member States. Prohibition of incitement of hatred is regulated in different ways by Member States' criminal laws. Copyright is one of the most harmonized legal areas. Promoting access to European works, as stated above, can only be considered guidelines, since "the practical meaning of which will probably diverge widely throughout the Member States (in some Member States perhaps amounting to a zero-burden)." (Valcke et al. 2007).

Requirements imposed on audiovisual commercial communications are regulated by the E-Commerce Directive and in consumer protection rules. The country-of-origin principle is also regulated by the E-Commerce Directive. However, the new limited possibility of derogation from the country-of-origin principle, as set in AVMSD, probably more effectively ensures the free flow of information and audiovisual programs in the internal market than do existing rules.

4.6. Impact of implementation on post-communist European media markets

The AVMSD regulates television broadcasting and on-demand services according to the principle of technology neutrality. However, the type, usage, and economic effect of on-demand services are not clear yet. The market can react in different ways. Since the services can move easily within and outside the EU, the market and the technological developments will shape the applicability of the Directive. If Member

States fail to implement the AVMSD, considering the way the market develops and the requirements of technological innovation, media players are highly likely to migrate. If any of the Member States offers a market-friendly solution, service providers may easily switch countries in the EU or even migrate outside the EU, which would have a severely adverse impact on the European economy.

Member States that decide to opt for flexible soft law regulation may come to play an important role in the media market of the EU. As we have seen, in post-communist countries soft law solutions are less well established than in other EU countries. In order to understand media policy in the EU and in Member States, one has to take into account the development of the media market, civil society, political and economic interests, and the social structure, since all of these indicators have a great influence on the way media functions, and vice versa.

This mutual relationship, together with the existing regulatory regimes in place, will help determine the different methods each Member State will use to implement the AVMSD. Nevertheless, there are considerable differences in the degree of state intervention. While intervention at EU level was prompted by competition issues, in post-communist countries the consideration of the media as a social institution is the underlying motive. Where the media is considered a tool to accomplish collective goals arising from political pluralism and the need to improve the quality of democratic life, and only secondarily as a private business, overregulation is a reality.

On-demand services are less developed where services and the percentage of Internet access are still low and co-regulatory methods are lacking. Therefore, *ex ante* regulation of on-demand services can distort the online media market in post-communist countries.

4.7. Questions relating to on-demand services

Below I attempt to specify the most important questions and problem areas that have to be answered and defined before implementing the AVMSD:

- Definition of on-demand services: Overlapping services should be cleared up in order to ensure legal certainty.

- European quota regime: Quota of European works concerning on-demand services is not an obligatory rule as stated above. Therefore, Member States can decide whether or not to apply quota for on-demand services.
- Right to reply and protection of human dignity: Guidelines already elaborated in the Recommendation on the protection of minors and human dignity and on the right to reply (European Parliament and the Council, 2006b) already includes appropriate guidelines for the implementation of measures in national law or practice, so as to ensure sufficiently the right to reply or equivalent remedies in relation to on-line media.
- New systems of licensing: The Preamble of AVMS states that “no provision of this Directive should require or encourage Member States to impose new systems of licensing or administrative authorisation on any type of audiovisual media service” (European Parliament and the Council, 2007).
- Using PIN codes and filtering: These provisions are recommendations in the AVMSD. Member States have to elaborate adequate measures of child protection, either using technology or in some other way.
- Deviation from country-of-origin principle concerning on-demand services.
- Leaning on co- and self-regulation: Careful analysis of the appropriate regulatory approach is necessary, in particular, to establish whether legislation is preferable for the relevant sector and problem, or whether alternatives such as co-regulation or self-regulation should be considered. Furthermore, experience has shown that both co- and self-regulation instruments, implemented in accordance with the different legal traditions of the Member States, can play an important role in delivering a high level of consumer protection.

4.8. Conclusion

As I have tried to show, the AVMSD has gone much further than the current stage of media market development in terms of converged services. On-demand services do not yet compete with television

broadcasting, but they will soon. Therefore, the overregulation of a developing media service can impair the media market. The media market must be thoroughly analyzed before implementing the AVMSD. If legislators fail to implement the AVMSD in compliance with market needs, there is a high probability that market players will migrate to other countries, to the detriment of national and EU markets at large. Flexible soft-law solutions are preferable; however, post-communist countries lack co-regulatory regimes. The opportunity to use soft law has been ensured, but the specific requirements of co-regulation will have to be elaborated with the involvement of all stakeholders. There are other circumstances that might require specific responses by new Member States in Central and Eastern Europe. These include such aspects as a lower access and use of the broadband Internet and new audiovisual services, as well as the perception of the media by political institutions and the society at large.

As the analysis above highlights, the ambiguities in the categories, the scope of the audiovisual media regulation, and the lines between linear, on-demand, and information society services are not clear, and might never be clear if media services continue to evolve at current speeds. Regulators need to recognize the limits of traditional top-down regulation. A paradigm change is needed in regulators' attitudes; only flexible regulatory methods can fulfill the requirements of legislation in the digital era.

NOTES

¹ Until now, on-demand services have been regulated by Directive 2000/31/EC of the European Parliament and of the Council of June 8, 2000, on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market E-Commerce Directive, while television broadcasting has been regulated by Television Without Frontiers Directive, besides general EC laws.

² In AVMSD "television broadcasting" or "television broadcast" (i.e. a linear audiovisual media service) means an audiovisual media service provided by a media service provider for simultaneous viewing of programs on the basis of a program schedule (European Parliament and the Council, 2007).

³ In AVMSD "on-demand audiovisual media service" (i.e. a nonlinear audiovisual media service) means an audiovisual media service provided by a

media service provider for viewing programs at a time chosen by the user and at his individual request on the basis of a catalogue of programs selected by the media service provider (European Parliament and the Council, 2007).

⁴ AVMSD Article 3h, 3i (European Parliament and the Council, 2007).

⁵ Joost is a system for distributing TV shows and other forms of video over the Web using peer-to-peer TV technology. It turns a PC into an instant on-demand TV without any need for additional set top box. News updates, discussion forums, show ratings, and multi-user chat are added to the service. Development started in 2006. By July 2007, there were more than a million beta-testers signed up. Joost was created by Niklas Zennstrm and Janus Friis, founders of Skype and Kazaa. Viacom, among others, entered into a deal with Joost to distribute content from its media properties, including MTV Networks, BET, and Paramount Pictures. There are now more than 20,000 TV shows and more than 400 channels available. Joost launched a Web version of its video player in 2008.

⁶ http://www.emarketer.com/Article.aspx?id=1006049&src=article_head_site-search; retrieved February 15, 2008.

⁷ <http://www.ctamnetforum.com>; retrieved February 20, 2008.

⁸ The exact amount varies depending on demographics, but the average respondent in a CTAM survey watched TV 31.4 hours per week and 0.9 hours Web video. Broadband video users watch slightly less (by eight percent) TV in total, and (by four percent) less prime-time content, compared to the total population.

⁹ I use the term "guidelines" further in the text to avoid confusion with the term "recommendation" under EC law.

¹⁰ According to the text of AVMSD, "co-regulation gives, in its minimal form, a legal link between self-regulation and the national legislator in accordance with the legal traditions of the Member States. Co-regulation should allow for the possibility of State intervention in the event of its objectives not being met" (European Parliament and the Council, 2007, para. 36).

¹¹ According to AVMSD "self-regulation constitutes a type of voluntary initiative which enables economic operators, social partners, non-governmental organisations or associations to adopt common guidelines amongst themselves and for themselves" (European Parliament and the Council, 2007, para. 36).

¹² There are several counter-arguments against the effectiveness and even the existence of self-regulation. See Prosser, 2008.

¹³ Available at http://www.ofcom.org.uk/consult/condocs/co-reg/promoting_effective_coregulation/co_self_reg.pdf; retrieved February 23, 2008. Criteria are the following: Beneficial to consumers, Clear division of responsibilities, Accessible to members of the public, Adequate funding and staff, Near-universal participation, Effective and credible sanctions, Auditing and review by Ofcom, Transparency and accountability, Consistency with similar regulation, Independent appeals mechanism, Divergence from the criteria.

¹⁴ “For the purposes of this Directive, the definition of an audiovisual media service should cover only audiovisual media services, whether television broadcasting or on-demand, which are mass media, that is, which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public. Its scope should be limited to services as defined by the Treaty and therefore should cover any form of economic activity, including that of public service enterprises, but should not cover activities which are primarily non-economic and which are not in competition with television broadcasting, such as private websites and services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest” (European Parliament and the Council, 2007, para. 16).

“For the purposes of this Directive, the definition of an audiovisual media service should cover mass media in their function to inform, entertain and educate the general public, and should include audiovisual commercial communication but should exclude any form of private correspondence, such as e-mails sent to a limited number of recipients. That definition should exclude all services whose principal purpose is not the provision of programmes, i.e. where any audiovisual content is merely incidental to the service and not its principal purpose. Examples include websites that contain audiovisual elements only in an ancillary manner, such as animated graphical elements, short advertising spots or information related to a product or non-audiovisual service. For these reasons, games of chance involving a stake representing a sum of money, including lotteries, betting and other forms of gambling services, as well as on-line games and search engines, but not broadcasts devoted to gambling or games of chance, should also be excluded from the scope of this Directive” (European Parliament and the Council, 2007, para. 18).

“The scope of this Directive should not cover electronic versions of newspapers and magazines” (European Parliament and the Council, 2007, para. 21).

“While the principal purpose of an audiovisual media service is the provision of programmes, the definition of such a service should also cover text-based content which accompanies programmes, such as subtitling services and electronic programme guides” (European Parliament and the Council, 2007, para. 22).

“In the context of television broadcasting, the notion of simultaneous viewing should also cover quasi-simultaneous viewing because of the variations in the short time lag which occurs between the transmission and the reception of the broadcast due to technical reasons inherent in the transmission process” (European Parliament and the Council, 2007, para. 24).

CHAPTER 5

A Failure in Limiting Restrictions on Freedom of Speech:

The Case of the Audiovisual Media Services Directive

PÉTER MOLNÁR

5.1. Introduction

This essay will first describe justifications for freedom of speech. Second, it will critically analyze the reasons presented for extending the scope of the EU's Television without Frontiers Directive by the Audiovisual Media Services (AVMS) Directive. Third, it will explore whether the general, non-media-specific rationale—the protection of “core societal values”—provided for the extension of the scope of the Television without Frontiers Directive is convincing, given that freedom of speech is undoubtedly one of the core values of our European tradition, and taking the constitutional treatment of hate speech in Hungary as an example. Finally, this essay will conclude that the AVMS Directive poses certain limitations to freedom of speech without providing justification for doing so, and it should be re-examined by the EU and the Council of Europe.

It has to be emphasized that this essay aims only to scrutinize the AVMS Directive from the perspective of freedom of speech, with particular attention to freedom of political speech, the openness of public discourse as a precondition for democracy, and the anti-incitement-to-hatred provision of the Directive, as the part of the extended regulation that can be abused to suppress dissenting voices.

5.2. Justifications for freedom of speech

First of all, if a state or a group of states wants to propose regulatory limits, the respective state or group of states has to make its case that the limitations are justified under the necessity and proportionality

tests elaborated by both national and international courts. In the absence of such justification, freedom of speech has to be respected.

The First Amendment of the U.S. Constitution sounds like an absolute prohibition on restricting freedom of speech: “Congress shall make no law [...] abridging the freedom of speech, or of the press.” But the sophisticated interpretations developed in American jurisprudence recognize justifiable limitations on the right to freely communicate information and ideas. Still, the fact that there are no reasons listed in the U.S. Constitution for limiting freedom of speech or freedom of the press provides an opportunity for stronger arguments against restrictions.

Like all other international documents, Article 10 of the European Convention on Human Rights states that “everyone has the right to freedom of expression” (Council of Europe, 1950, Article 10.1). At the same time it lists reasons why this right can be restricted. According to its “necessity test,” the European Court of Human Rights makes its judgments after deciding whether the restriction on freedom of expression in a member state of the European Council was based on a rule prescribed by law, falls under one of the reasons listed in paragraph (2) of Article 10, whether it is “necessary in a democratic society” (Council of Europe, Article 10.2), and whether it is proportionate with its intended purpose.

Even if Article 10 of the European Convention on Human Rights provides more room for limiting freedom of speech than the First Amendment in the U.S. Constitution does, the ECHR also makes it clear that limiting freedom of speech has to meet strict constitutional measures.

There are many eloquently expressed rationales for freedom of speech to be respected by governments and international organizations. Below I list just a few examples, including some of the most often-mentioned justifications for freedom of expression. The extension of the scope of the Television without Frontiers Directive by the AVMS Directive has to be considered in the light of the arguments for freedom of speech.

5.2.1. Search for truth¹ and the marketplace of ideas

John Stuart Mill (1859, 1978) argued that in the search for truth, even the free expression of wrong opinions is highly valuable for humanity:

"[...] the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: If wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error" (Mill, 1978, p. 16). As part of a cross-Atlantic dialogue on freedom of expression, building on Mill's ideas, Justice Holmes wrote that "the best test of truth is the power of the thought to get itself accepted in the marketplace of ideas."² Sketching the concept of the "marketplace of ideas" (an idea that has itself been a popular subject of constant debate in this unique marketplace), Holmes produced the first theory of the First Amendment. It is a theory that continues to hold force, as reflected, for example, in the Hate Speech on the Internet recipe of the Media Freedom Internet Cookbook, which drew recommendations from the 2004 Amsterdam Internet Conference of the OSCE Representative on Freedom of the Media: "Instead of focusing on ways to censor hate speech, we must concentrate on answering such expression with more speech. The battle against intolerance cannot be won through government regulation or mere legislative action. Instead, it is a fight that will be won or lost in the competition of ideas."³

5.2.2. Democratic self-government

Besides the argument for truth, another instrumental justification for freedom of speech is that without it, democratic self-government simply cannot work appropriately. Of course, self-government requires limiting the government itself, in order to avoid concentration of power. Effective control of the government is particularly important in regard to freedom of speech, because no living human being in a position of power can rest easy when her public activities are criticized.

Self-government requires a robust public discourse, but it is precisely the allowance of the robust public discourse that requires self-limitation from those in power. In other words, the rule of the game is that public officials have to be confronted with far more criticism than ordinary citizens. It is extremely difficult to admit one's own errors, especially if one is harshly criticized. At such times, many convince

themselves that their sacred goals are inherently right and faultless, and that criticism should therefore be suppressed.

The precondition for introducing self-limiting regulation is to recognize that self-limitation is a fundamental necessity. Does this step require special historical moments such as the foundation of the United States or the post-communist transitions to democracy? Probably so. The fundamental principle of free speech and the foundation of the divisions of power were laid down at historic moments. Then the respective structures worked out the speech-protective interpretation of that principle. Self-limitation is necessary, but without the help of outside structural restrictions, self-limitation alone is not sufficient. Like Odysseus when he heard the song of the sirens, we cannot really limit ourselves, but we must create a structure to limit each other.⁴

Even if the separation of powers can help us to limit the authoritative influence on the public debate about speech law, the common understanding of the necessity of self-limitation in this field is a basic task for all democracies. It is easier to meet this challenge if we do not forget about the threats we may pose to ourselves. In other words, to keep this wisdom alive, constitutional norms should be enriched with lessons learned in the post-dictatorial countries. This is all the more true because our world, with its fast-developing technology and sprawling democracy, may cause us to forget about such pitfalls.

Can the potentially suppressive forces be only others? Or could we find ourselves in the position of the powerful? Actually, if we are aware of our human nature—which is far from perfect—it may come as a surprise that we are able to develop self-limiting regulation at all. The difficulties of self-limitation may be detected in the story of the fall and rise of the licensing system during the English Revolution in the seventeenth century. The licensing system briefly collapsed and was later re-introduced. John Milton wrote his famous *Areopagitica* (1644, 1918) against censorship, when “the very English people in whom he had once placed so much trust” reintroduced the previously abolished licensing system only some years later because of their fear that the proliferation of publications would support the king in the war (Blasi, 1996, p. 9). As Vincent Blasi writes: “Then the new technology of mass communication was the unlicensed pamphlet, printed in bulk, in the vernacular, no longer confined to abstruse theological disquisitions” (1996, p. 14). Once in power, the revolutionary forces were

frightened by the powers of the effective new technology, forgetting that the licensing system served the power of the king, their opponent.

Examples of this can be found not only in the distant past, but in the more recent experience of the former Soviet bloc and in former dictatorships elsewhere.⁵ They keep reminding us to be cautious, because we are “crazy monkeys,” to quote the Hungarian scientist and Nobel Prize winner Albert Szent-Györgyi (1989).

Thus, the self-government rationale for freedom of speech is about limiting and controlling the government in order to create and maintain open, robust public discourse which serves as a fundamentally important check on governmental power. Vincent Blasi called it “the checking value” in the First Amendment of the U.S. Constitution. As Blasi writes: “[...] free expression is valuable in part because of the function it performs in checking the abuse of political power, [...] While a proponent of the checking value may regard free expression as important partly because of its contributions to progress, wisdom, community, and the realization of individual potential, he is likely to value free expression primarily for its modest capacity to mitigate the human sufferings that other humans cause. Much of that suffering is caused by persons who hold public office” (Blasi, 1977, p. 528).

The pessimistic tone about human nature appears throughout Blasi’s works. He thoroughly analyzes Milton’s disappointment in the English people and scrutinizes dilemmas of freedom of speech through a dialogue spanning the Atlantic and spanning centuries. The underlying idea, carried through the ages, is that we, as humans, should not allow ourselves to control public discourse, for without free public discourse, abuse of power is inevitable. This wisdom should be emphasized much more than it is. Sweeping, superficial arguments about the workings of political communities emphasize the dangers of free speech. A beautifully written response to those urging limits on free public discourse is Justice Brandeis’ famous concurring opinion in the *Whitney* case, joined by Justice Holmes. Brandeis wrote:

“Those who won our independence [...] believed liberty to be the secret of happiness and courage to be the secret of liberty. [...] They recognized the risks to which all human institutions are subject. But they knew [...] that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate;

that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.”⁶

Brandeis recognized “the risks to which all human institutions are subject,” but he argued that repression of ideas inevitably undermine government.

5.2.3. Individual autonomy

As opposed to instrumental justifications of freedom of speech, the argument based on individual autonomy supports the free communication of information and ideas as a value in itself, not as a value that serves another goal. The Hungarian Constitutional Court combines the argument about individual freedom with the one about the social process of a public discourse:

“The Constitution guarantees free communication—as an individual behaviour and social process—and it is not the content to which the right of free expression relates. Every opinion, good and damaging, pleasant and offensive, has a place in this social process, especially because the classification of opinions is also the product of this process. [...] With the freedom of the press having become a reality no one speaking out publicly may invoke external compulsion, and with every line penned he gives himself out and risks his entire moral credibility.”⁷

Ronald Dworkin (1996) emphasizes that the constitutive justification of freedom of speech—which does not rely on free speech’s instrumental value—provides the necessary broad protection for all expressions. Beside the speaker’s point of view, Dworkin also lays down a clear argument from the perspective of the listeners: “We retain our dignity, as individuals, only by insisting that no one—no official and no majority—has the right to withhold an opinion from us on the ground that we are not fit to hear and consider it” (1996, p. 200). Edwin Baker argues that freedom of speech has to be respected because it is “central to individual liberty”: “[...] freedom of speech is fundamental less because of its instrumental value or the value of reasoned arguments

and more because freedom to engage in self-expressive acts is central to individual liberty. [...] Part of the reason to protect speech, [...] is a commitment to the view that people should be able to participate in constructing their world” (1994, p. 1197).

The quotes from the Constitutional Court, Dworkin, and Baker together can be subsumed in a view that we cannot be dignified participants in public discourse if we cannot express what we wish to say, and if we cannot hear what others wish to express. Robert Post (2000) puts forth a “participatory theory,” arguing that open public debate makes individuals authors in democracy, even if their opinions do not win the support of a majority.

5. 3. Justifications for media-specific restrictions on freedom of speech

The quote from Dworkin reflects a salient question. Under which circumstances and to what extent can/should a state or a group of states limit freedom of speech in order to protect the rights of those to whom the speech is addressed? At this point it is important to make a distinction between general restrictions that apply to expressions uttered in any part of the public sphere and media-specific restrictions that apply only to a particular segment of the public sphere. Traditionally, communication through radio and television is considered a part of the public sphere, where the special characteristics of the communication technology justify and might even trigger certain regulations of the content. This refers especially to content that could not be justified in regard to the other parts of the public sphere without the specific features of the technology necessary to carry radio and television programs.

A relevant example of general restrictions on freedom of speech can be found in the second paragraph of Article 10—on freedom of expression—of the Council of Europe’s Convention for the Protection of Human Rights:

“The exercise of these freedoms, since it carries with its duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial

integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary” (Council of Europe, 1950, Article 10.2).

At the same time, the first paragraph of Article 10 sets the stage for media-specific restrictions: “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises” (Council of Europe, 1950, Article 10).

Placing the reservation that provides that restrictions attached to “broadcasting, television or cinema enterprises” are acceptable under the Convention as the third sentence of the first paragraph highlights that these limitations on freedom of expression are separate from the ones listed in the second paragraph. The text of the Convention mentions not only broadcasting, but also television and cinema enterprises. In the well-known *Jersild* case, the European Court of Human Rights reasoned that: “[...] the potential impact of the medium concerned is an important factor and it is commonly acknowledged that the audiovisual media have often a much more immediate and powerful effect than the print media [...]. The audiovisual media have means of conveying through images meanings which the print media are not able to impart.”⁸

But neither the text of the Convention nor the reasoning of the Court should lead to a reading of the Convention that allows for unjustified restrictions on freedom of speech. As András Sajó writes: “Research indicates that the Convention or its equivalents were used nearly 1200 times in 109 countries to justify various restrictive measures aimed at the press.”⁹ The European Court of Human Rights is moving towards the broader recognition of freedom of expression as an international human right (Hins and Vorhoof, 2007) and it should continue to maintain this direction to effectively protect freedom of speech under the European Convention for Human Rights.

5.4. The Audiovisual Media Services Directive and the draft convention of the Council of Europe on access to public data

Unlike the former Television without Frontiers Directive (European Parliament and the Council, 1997), the AVMS Directive (European Parliament and the Council, 2007) covers a broadened scope of audiovisual media services, including both on-demand and scheduled services. The shift of the Directive towards on-demand audiovisual media services is accompanied by the institutional shift towards communication regulatory bodies and broadening of their competences. The observation of a *Financial Times* article written in the fall of 2006 critically observes this fundamental change in the European media regulatory landscape: “Whereas the TWF directive dealt with an established medium, the fundamental problem with the AMS directive is that the delivery channels Brussels hopes to regulate have not been developed fully yet. What can the policy-makers hope to achieve in trying to lay down the law now? [...] the lack of exposure and discussion on such a fundamental issue is mystifying.”¹⁰

The legislative proposal adopted by the Commission on December 13, 2005, argued that the control exercised by users on non-linear services justifies lighter regulation.¹¹ But instead of leaving the non-linear media services within the scope of the E-Commerce Directive, the on-demand services were incorporated in the new Directive. The self-contradicting manner of the argument in support of the Directive can be illustrated by the following comments addressed by Viviane Reding, Commissioner for Information Society and Media: “Today, audiovisual service providers supplying the same content as traditional broadcasters are often regulated very differently, solely because they use a different mode of delivery. Often, such differentiated regulation is justified by the different degree of user control.”¹²

The argument further develops in what follows: “However, where core societal values—such as protection of minors or the fight against racial hatred—are concerned, such differentiation is hard to justify. Why, for instance, should the same film be subject to differing child protection rules, or none, depending solely upon whether it’s a scheduled TV broadcast, or whether you downloaded it?”¹³

Hence it should be assumed that the reason for expanded regulation is protection of “core societal values.” Of course the question immediately arises: Where is the argument for freedom of speech as a core societal value? Freedom of speech is strongly rooted in our common European heritage and values. Unfortunately the argument for the Directive revision has not fully recognized the importance of these values. The Proposal’s Explanatory Memorandum states: “Concerning [...] the incitement of hatred, there seems to be quite a broad consensus on the current balance in the TVWF Directive. Member States, public service broadcasters, religious organizations and consumers’ and viewers’ organizations have all expressed the view that [...] the value of human dignity) should apply to non-linear services as well, and not only to traditional television.”¹⁴

It is questionable to claim a broad consensus for the extension of the scope of the Television Directive based on the opinions of some organizations, when many other organizations, among them the representatives of Internet providers and cyber-liberty advocate groups, were not mentioned. But if accuracy was not a strength of the Commission’s proposal, neither was theoretical clarity. The Explanatory Memorandum ventured the following obscure argument: “The set of applicable rules shall no longer depend on the delivery platform but on the nature of a service.”¹⁵

An important question appears in this context: Should we base limitations on free speech in Europe on undefined terms such as the “nature” of communication services? My answer is no. As Lawrence Lessig writes: “Nature. [...] This kind of rhetoric should raise suspicions in any context. [...] If there is any place where nature has no rule, it is in cyberspace. If there is any place that is constructed, cyberspace is it” (Lessig, 1999, p. 24).

In June 2006, dozens of media scholars from a number of countries signed a critical Declaration¹⁶ concerning the planned AVSM Directive.

“As European media scholars we call the attention of the decision makers of the European Union and the Council of Europe that the revision of the Television without Frontiers Directive of the European Union and the European Convention on Transfrontier Television of the Council of Europe should not restrict freedom of expression and

freedom of information on the Internet, and should not impose undue, premature regulation on fast-changing new communication technologies. The extension of the scope of some rather burdensome part of the Television Directive to the Internet [...] would be an unjustifiable restriction of freedom of speech and freedom of information. Neither the scarcity of frequencies, nor the push media character of television applies to the unique architecture of the Internet.”¹⁷

When the Declaration was born, the scope of the directive was already narrower than had originally been proposed by the European Commission. The scope of the draft had been narrowed down to cover only audiovisual media services, instead of covering all audiovisual Internet content. The final text of the Directive incorporated further significant changes in order to define more strictly the scope of the document.¹⁸ Yet the new Directive still contains limits on the freedom of communicating ideas and information through a fast-growing and the freest-ever communication tool, the Internet. The line between content that is covered and not covered by regulation is still not clear.

The more fundamental problem, however, is that some of the content-based rules in the AVMS Directive apply to both broadcast and on-demand services. In this light, the argument of lighter-touch regulation for on-demand services sounds rather weak. Highlighting lighter-touch regulation in previous communication initiatives gave the impression that on-demand services will not fall under the same rules as broadcast services. In some cases they do. The above-mentioned Declaration observes that freedom of speech could be under threat, especially in new Central and East European Member States: “The unjustifiable restrictions suggested in the draft proposal of the European Commission would put freedom of speech and freedom of information at risk especially in Central- and East European countries where arbitrary use of the state regulatory power is more likely than at least in some West European democracies.”¹⁹

The Recommendations²⁰ of December 2006, produced by the workshop of CEU, OSCE, and the Rafto Foundation for Human Rights touched upon technological challenges:

“The platform-neutral approach of the draft AVMS Directive targets a vast area of new and yet to be developed services, including those

that differ considerably from 'classic' broadcast. [...] The Directive for the first time on the European level permits content-based restrictions of speech outside traditional broadcast, including content on the Internet, so called 'non-linear audiovisual media services.' This poses enormous regulatory challenges. The debate until now has shown that there is no sufficient level of common understanding on how to address this rapidly changing communication environment."²¹

Content regulation can constrain freedom of speech, especially in less developed democracies. What will it mean in states where democracy is fragile, and particularly where the Internet is the only free channel of communicating ideas and information? Some governments might see this as an easy opportunity to regulate speech or suppress a political dissent through the anti-hate speech provision of the AVMS Directive. At the same time, whether the anti-hate speech provision can be used effectively is open to question. A racist website in Hungary can be used as an illustration. The Olah Action Web site contained a video game based on killing the Roma community "to make one county after another Roma-free." Self-regulation worked, as far as it can work for a Web site, and the site was closed down by the provider after receiving notice from Radio C, the Roma community station in Budapest. But later, the site became available again through another server. Another example is Tajdeed.org.uk, which "supports, portrays and glorifies terrorism" and "is a London-registered particularly well-financed one of hundreds of jihadist message boards."²² J. Lasker notices that Tajdeed.org.uk was shut down several times in the past twelve months and kept reappearing on different servers around the world.²³

Unlike the examples mentioned above, the Al Manar case²⁴ shows that a satellite television channel spreading hate speech can be successfully removed from the transmitting satellite, and that it is much harder for such a station to find another satellite to reach its audience again. New communication technologies require new regulatory approaches. Such approaches already exist. Besides the laws based on the E-commerce Directive of the European Union, general laws, like the Criminal Code or the Civil Code, apply to content communicated through the Internet and other new technologies as well. Self-regulation can substantially cover all fields of the content-based regulatory provisions of the AVMS Directive.²⁵ Amending the laws based on the

E-Commerce Directive is probably necessary, but only to the extent that the new directive explicitly requires Member States to rely on state regulation when implementing the directive. As the above-mentioned Declaration states: "The E-Commerce Directive of the European Union already provides the necessary regulatory framework for the information society services. [...] The fast development of the new communication technologies also triggers that both the European Union and the Council of Europe rather rely on self-regulation and let the new communication technologies to develop freely and people to exchange ideas and information through them unrestricted."²⁶

It has to be emphasized that limitations to free speech are especially damaging if they target channels of communication that might provide the only means of freedom of expression.

5.5. Core values as a general justification to restrict freedom of speech in Europe?

Besides the scarcity argument for regulating television, the justification of media-specific, content-based regulation of television, or linear services is that they work as push media with largely the same time mass-impact. This justification is *not* relevant for non-linear services, because they do not rely on scarce resources, are individually used, and work as pull media. Prohibition of hate speech on television, based on media-specific content, is not applicable to the Internet, because the basic features of the Internet are just the opposite of the characteristics that justify the special restrictions on radio and TV. For the same reasons, the traditional media regulation of linear/broadcast services has definable scope, while the scope of an attempted regulation of demand/non-linear media services cannot be defined.

A huge policy change brought by the AVMS Directive has an important institutional implication: It shifts the media and communication policy domain towards the regulatory authorities usually working under the government. Thus, a protection of "core societal values" cannot be based on a media-specific justification.

With all these reservations, we can still examine whether the argument about the protection of "core societal values" could support the extension of the scope of the Directive, leaving aside the issue that

the old and the new Directive are not general regulations, but media-specific ones. When assessing the societal value argument, it has to be highlighted that freedom of expression is also a core societal value in Europe. To provide a balanced assessment of core societal values at stake in connection with the anti-incitement-to-hatred provision of the AVMS Directive, the following part will focus on argumentation favoring freedom of expression by the Constitutional Court of the Republic of Hungary in its decisions concerning hate speech.

5.6. The protection of free speech as a core societal value—the constitutional treatment of hate speech in Hungary

The Constitutional Court's 1992 hate-speech decision played a decisive role in the Hungarian constitutional argument about freedom of speech and public debate.²⁷ The reasoning of the decision mirrors the political climate of a newly post-communist country, where liberty in the 20th century was rare and where people could appreciate the value of free expression long denied them:

“Historical experience shows that on every occasion when the freedom of expression was restricted, social justice and human creativity suffered and humankind's innate ability to develop was stymied. The harmful consequences afflicted not only the lives of individuals, but also that of society at large, inflicting much suffering while leading to a dead end for human development. Free expression of ideas and beliefs, free manifestation of even unpopular or unusual ideas is the fundamental requirement for the existence of a truly vibrant society capable of development” (Sajó, 1995, pp. 6–7).

The Court's reasoning reflects the sensibility of a people who have first-hand experience of freedom denied. This experience highlights the fact that a society that restricts freedom of speech on the basis of its content is playing with fire, if not worse. It emphasizes not the risk of allegedly, or really dangerous speech, but rather the risk of censorship.

In its third hate speech decision, in 2004, the Constitutional Court stressed that equality also triggers state restraint from content-based regulation of speech, because

“[...] the State may not prohibit the expression and the dissemination of any views merely on the basis of their contents, nor may certain opinions be declared more valuable than others, as this would violate the requirement of treating individuals as persons of equal dignity (such a prohibition would result in preventing certain groups of people from expressing their personal convictions), and—by excluding certain views—prevent the development of a free, lively, and open debate involving all relevant opinions, even before a political discourse could emerge.”²⁸

But should even racist speech be part of the public discourse? What would require a democracy to tolerate such expressions in its political debates? The answer lies in what Robert Post calls the “paradox of the public discourse” (Post, 1990): “the first amendment, in the name of democracy, suspends legal enforcement of the very civility rules that make rational deliberation possible” (Post, 1991, p. 287). Of course, making public discourse possible is only one of the many reasons for prohibiting racist and other hate speech. But the “paradox of public discourse” includes the equality argument of the Constitutional Court. As Post writes:

“The norm of equality violated by racist speech [...] is substantive; [...] It is the kind of norm that ought to emerge from processes of public deliberation. Although the censorship of racist speech is consistent with this substantive norm of equality, it is inconsistent with the formal principle of equality, because such censorship would exclude from the medium of public discourse those who disagree with a particular substantive norm of equality. Such persons would thus be cut off from participation in the processes of collective self-determination. First Amendment doctrine has tended to resolve the paradox of public discourse in favor of the principle of formal equality, largely because violations of that principle limit pro tanto the domain of self-government, whereas protecting uncivil speech does not automatically destroy the possibility of rational deliberation” (Post, 1991, p. 304).

The Hungarian Constitutional Court seems to follow the same logic, and in its 2004 decision it emphasizes that only the test against consequences—as opposed to a content-based approach—can meet the strict constitutional requirement to protect freedom of speech. The

Court argues that: "Even in the case of extreme opinions, it is not the contents of the opinion but the direct and foreseeable consequences of its communication that justify a restriction of free expression and the application of legal consequences..."²⁹

After decades of censorship, the prevailing view in Hungary supported more speech and was reluctant to restrict communication. The argument of the Constitutional Court reflects the words of Justice Brandeis, providing one more example of the cross-Atlantic dialogue on freedom of speech: "Those who won our independence by revolution were not cowards. [...] If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."³⁰

Of course, averting evil through criticism requires engagement, which is seemingly less comfortable than relying on the state to prohibit hate speech. But at least under some circumstances, which are unique to each country, as the example of Hungary shows, it is an effort worth making, as it can contribute to the development of a good citizenry. As Vincent Blasi writes: "[...] a regime of free speech can help to develop character by requiring those who would beat back bad ideas and contain evil demagogues to pursue those worthy objectives in the most arduous way: engagement rather than prohibition. [...] In this view, the most dangerous ideas can be defeated only by strong persons, not by repressive laws" (Blasi, 1999, pp. 1573–1574).

John Stuart Mill, at the end of the second chapter of his essay "On Liberty," recapitulates the four grounds that in his view justify the liberty of thought and discussion, including the value of letting even obviously wrong opinions be freely expressed.

"Thirdly, even if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds. And not only this, but, fourthly, the meaning of the doctrine itself will be in danger of being lost or enfeebled, and deprived of its vital effect on the character and conduct: the dogma becoming a mere formal profession, inefficacious for good, but cumbering the ground and preventing the growth of any

real and heartfelt conviction from reason or personal experience” (Mill, 1978, p. 50).

The HCLU offers similar reflection, but goes even further than Mill. In the view of the HCLU, banning opinions that would challenge the truth not only results in accepting the truth “in the manner of a prejudice,” or as a “dogma,” as Mill writes, but might make the general public skeptical about the truth. The HCLU explicitly mentions Holocaust denial as an example. It argues that “prohibiting the expression of any views, even those which are obviously false, may harm the community. As long as it is not forbidden to deny an established truth (e.g. that the Holocaust took place), the general public has good reason to believe what the experts say about the facts of history. If it becomes forbidden publicly to deny a thesis, the general public will be deprived of any basis for its belief in what the expert says.”³¹

Arguments from the First Amendment jurisprudence could have been influential in Hungary because the framers of the American Constitution were motivated by similar experiences. For example, one state suppressed a particular religion in the name of another, and wrongly so. America’s founding fathers were aware of the dangers of leaving too much power in one hand. Interestingly, during the democratic transition, the new political parties in Hungary, rejecting the previous totalitarian governments and building on the experience of democracies and liberal political philosophy, were similarly suspicious of concentrating state power and allowing the government to regulate the public discourse.

5.7. Conclusion

The extension of the scope of the EU’s Television without Frontiers Directive into the Audiovisual Media Services (AVMS) Directive has not been supported by either general or media-specific justifications that would eventually legitimize limitations on freedom of speech. The new Directive presents a clear example of regulatory intervention in the process of free communication that cannot be sufficiently defended against limitations of free speech protected under the constitutional rules. Freedom of expression remains a core societal value in Europe

only if—at least—the implementation of the new Directive narrows the use of regulation to its constitutionally justifiable scope. Meanwhile, the Council of Europe has a huge responsibility when it reviews its own Television without Frontiers Convention.

NOTES

¹ For a critical analysis of the truth-related argument for freedom of speech, see Schauer (1982).

² Justice Holmes dissenting in *Abrams v. United States* 250 US 616 (1919).

³ *The Media Freedom Internet Cookbook* (Vienna: OSCE, 2004), pp. 21–22.

⁴ Jon Elster's metaphor of a roped Odysseus to express the nature of the constitutional self-limitation is mentioned in Sajó, A. (1999, p. 7).

⁵ See "After the Fall," ed. Snyder (1999).

⁶ See Justices Brandeis and Holmes concurring in *Whitney v. California*, 274 U.S. 357 (1927).

⁷ Constitutional Court Decision 30/1992 (V. 26.) AB, pp. 15–17. (<http://www.mkab.hu/content/en/en3/13589104.htm>; retrieved July 1, 2008).

⁸ *Jersild v. Denmark*, September 23, 1994, Application number 00015890/89, article 31.

⁹ Sajó (2004, pp. 96–97). In footnote 85 of his work, Sajó provides the following data on the research he is referring to: Bullen, D., and R. Stark, (1997) *Perverse Result: How the European Convention on Human Rights Supports Global Restrictions on Press Freedom*, Collected Cases and Commentary, World Press Freedom Committee.

¹⁰ MacKenzie, K. (2006), "Truly Nonsensical Law for Television," *Financial Times*, September 5, 2006.

¹¹ The legislative proposal for the revision of the "Television without Frontiers" Directive adopted by the Commission on 13 December 2005, Preamble (28).

¹² Reding, V., Commissioner for Information Society & Media, speech (http://ec.europa.eu/information_society/newsroom/cf/comnews.cfm?type=sp; retrieved July 2, 2008).

¹³ *Ibid.*

¹⁴ The legislative proposal for the revision of the "Television without Frontiers" Directive adopted by the Commission on 13 December 2005 Explanatory Memorandum, p. 5.

¹⁵ *Ibid.*, p. 10.

¹⁶ The declaration was drafted by the author of this article during the COST Conference at the Central European University in Budapest.

¹⁷ Budapest Declaration for Freedom of the Internet, June 15, 2006 (<http://www.cmcs.ceu.hu>). See also <http://www.edri.org/edrigram/number4.16/budapestdeclaration>.

- ¹⁸ Among Member States, the British government—and Ofcom—argued for a significant narrowing of the scope of the new Directive, if covering on-demand/non-linear services.
- ¹⁹ Budapest Declaration for Freedom of the Internet, June 15, 2006 (<http://www.cmcs.ceu.hu>). See also <http://www.edri.org/edrigram/number4.16/budapestdeclaration>.
- ²⁰ The recommendations were produced by the workshop on non-linear audiovisual media services and the draft EU audiovisual media services directive organized on December 1, 2006, by the OSCE Representative on Freedom of the Media, the Center for Media and Communication Studies of the Central European University Budapest and the Rafto Foundation for Human Rights.
- ²¹ Recommendations to the European Parliament on the draft AVMS Directive; available at http://www.osce.org/documents/rfm/2006/12/22708_en.pdf.
- ²² Grace, N. (2005): "How Radio al-Tajdeed Outwitted British Law," available at www.clandestineradio.com, retrieved August 18, 2005.
- ²³ Lasker, J. (2005) "Terror Forum Sows Seeds of Jihad," *Wired News*, July 19, 2005.
- ²⁴ "In 1991, shortly after Hezbollah actively entered the Lebanese political scene, Al Manar TV was launched. The television has been several times accused of broadcasting programmes containing hatred and violence. In December 2004, the US Department of State put Al-Manar on the Terrorist Exclusion List due to the channel's 'incitement of terrorist activity.' On 13 December 2004, the French 'Conseil d'Etat,' the highest administrative Court in France, ordered the French-based Eutelsat Company to shut down Al Manar broadcasts following accusations that its programmes were anti-Semitic and could incite hatred. [...] On 14 December Al Manar obliged voluntarily [...]. The TVWF Directive assigns responsibility for ensuring that its rules are respected to the Member State that has jurisdiction. In this case the French authorities were responsible for prohibiting the broadcasts of Al Manar because Al Manar was transmitted via the French satellite system Eutelsat." Available at [http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/05/98&format=HTML&aged=0&language=EN&guiLang=ue=en](http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/05/98&format=HTML&aged=0&language=EN&guiLang=ue=en;); retrieved July 3, 2008.
- ²⁵ For example, Hungary has a self-regulatory system for the Internet content providers, established by the Hungarian Association of Content Providers (MTE). Since its establishment in 2001, MTE has provided an effective example of self-regulation. The MTE was founded to avoid the extension of the authority of the ORTT to cover the Internet, as has been suggested by a former chairman of ORTT.
- ²⁶ Budapest Declaration for Freedom of the Internet, June 15, 2006 (<http://www.cmcs.ceu.hu>). See also <http://www.edri.org/edrigram/number4.16/budapestdeclaration>.
- ²⁷ For a critical assessment of the decision, see Sajó, A. (1994).

²⁸ Decision 18/2004 (V. 25.) AB, p. 7; available at <http://www.mkab.hu/content/en/en3/09360304.htm>; retrieved July 3, 2008.

²⁹ Decision 18/2004 (V. 25.) AB, p. 7; available at <http://www.mkab.hu/content/en/en3/09360304.htm>; retrieved July 3, 2008.

³⁰ See Justices Brandeis and Holmes concurring in *Whitney v. California*, 274 U.S. 357 (1927).

³¹ HCLU (Hungarian Civil Liberty Union) (2001) Policy Paper on Freedom of Information, available at http://www.tasz.hu/files/tasz/imce/infoangol_uv.pdf.

CHAPTER 6

Struggling with Diversity:

Objectives, Outcomes, and Future of the European Quota Policy in the Context of the Television Scene in the Czech Republic

VÁCLAV ŠTETKA

The legislative framework for regulation of the European audiovisual sector has recently witnessed a major innovation, represented by the “modernizing” of the almost eighteen-year-old Television without Frontiers Directive (89/552/EEC), last amended twelve years ago (97/36/EC). In light of the rapid technological development in the field of audiovisual production and distribution, which has reduced television to just one of many media providing audiovisual content, the European Commission decided on a considerably larger revision than in 1997. The scope of the change is evident in the replacement of the very name of this legislative instrument, which was adopted by the European Parliament and Council of the European Union on December 11, 2007, under the title “Audiovisual Media Services Directive” (European Parliament and the Council, 2007).

However, when discussing the new framework for European audiovisual policy, the substantial transformation not just of media technologies, but of the European Union itself, needs to be taken into account. In the past several years, the EU has undoubtedly experienced the biggest structural, political, and cultural challenges since its establishment by the 1992 Maastricht Treaty. These challenges are brought about not only by the unprecedented scope of enlargement, which more than doubled the number of Member States (compared with the starting point in 1992) and brought into a common legislative and economic space countries with vast historical, cultural, and economic differences. Another, parallel source of these challenges is the continuing processes of *political* integration. Aimed at strengthening the institutional structure of the EU and shifting the decision processes away from the nation-states towards European institutions, integration is

seen by many as a road to the establishment of the European “super-state.” Nevertheless, the failure of the attempt to introduce the project of the European Constitution in 2005 has fueled doubts about the existence of a European demos as a subject of the Constitution, as well as the criticism of the so-called democratic deficit allegedly suffered by the EU (and the integration project in general) (see Bowman, 2006). It seems that now, perhaps more than at any other time in the history of European integration, Europe needs to discuss which ideas and principles the future of the integration process should be built upon, and how to achieve a higher level of popular support for the integration project—that is, if the process of creating “an ever closer union” (as is stated in the Treaty of Rome) will continue. Such questions are especially relevant for audiovisual media, whose potential for spreading of a European consciousness, construction of a European identity, and building of a European communication space has recently become the subject of extensive theoretical as well as empirical research (Bruter, 2003; Kevin, 2003; Jochen and de Vreese, 2004; Schlesinger and Fossum, 2005). Apart from exploring the role of media in processes of European integration, focusing mostly on the structures of pan-European media industry (see Chalaby, 2002) or on the media coverage of pan-European topics (Trenz, 2004; Downey and Koenig, 2006; Machill, Beiler, and Fischer, 2006), attention has also been aimed at the analysis of European media policy, attempting to stimulate the role of media as agents of integration by various regulatory measures, as well as by several grant programs (Levy, 2001; Wheeler, 2004; Nenova, 2007).

This chapter¹ follows the research framework sketched above, as it aims to examine cultural objectives of European audiovisual policy, represented mainly by the Television without Frontiers Directive (hereafter “TWF Directive”) and its recent successor, the Audiovisual Media Services Directive. In the first part, I briefly review cultural goals and conceptualizations of European culture and identity in the historical evolution of European broadcasting legislation. After that, I focus on critical review of the existing results of the program quota policy (contained in Articles 4 and 5 of the TWF Directive) across Europe. The second part of the text is devoted to the empirical case study of the implementation of this policy into Czech media legislation, combined with a look at the programming strategies of Czech TV stations as well as into Czech TV audience behavior. Both point to a considerable failure of the quota

policy in one of its manifest goals—support of cultural diversity. In the final part, I examine cultural objectives contained in the new Audio-visual Media Services Directive and discuss to what extent they differ from the Directive's legislative predecessor.

6.1. Culture and identity in the European audiovisual policy

As Mira Nenova (2007, p. 4) observes, even though broadcasting “was not one of the original regulatory domains of the EC” and was not explicitly referred to in the 1957 Treaty of Rome but only first in the Maastricht Treaty,² it does not mean that the EC was not paying attention to this field prior to 1992. However, it was not the European Commission but the European Parliament that first took an initiative within the European Community, when, in 1982, it passed its first resolution devoted to television, the Resolution on Radio and Television Broadcasting in the European Community (based on the Hahn Report; see Collins, 2002). Apart from general warnings against the deregulation of broadcasting and against the commercialization of information, this resolution specifically mentioned the need to focus on European culture and consciousness and pointed to information media as a means for constructing European identity, regarding information as one of the decisive factors in processes of European integration.³

The European Commission first addressed the issue of broadcasting in 1984 with the Green Paper on the Establishment of a Common Market in Broadcasting, Especially by Satellite and Cable. This paper, according to Nenova (2007, p. 5), marked the actual beginning of the Community's audiovisual media policy and can be regarded as a direct predecessor to the TWF Directive. The document called for creating a common European audiovisual space, which was explained by the need to contribute, by means of shared television programs, to closer relations between the European nations and the building of the European identity. Television was conceived as an instrument for creation and cultivation of the awareness about the richness and diversity of the European cultural heritage, and for promoting recognition of a “common fate.” Creating a strong European audiovisual industry, apparently the main objective of the planned policy, was supposed to help Europeans to “protect their cultural identity” and nourish “the hope

for economic development in light of American and Japanese expansion" (Schlesinger, 1991, p. 140).

The Rhodes meeting of the European Council in 1988, which asked to "strengthen effort" and "speed up work" on the TWF Directive, also expressed its conviction that the European audiovisual policy initiatives, leading to the "emergence of a truly European audiovisual market," "will contribute to a substantial strengthening of a European cultural identity" (European Union, 1988).

However, of all these cultural objectives, explicitly mentioning the building of European identity and promoting European cultural heritage, few were actually included in the recitals of the Television without Frontiers Directive (adopted in 1989, went into effect in 1991), the "prime EC regulatory tool for audiovisual media" (Nenova, 2007, p. 5). Even though the Directive, in its first recital, repeated the goal of "establishing an ever closer Union among the peoples of Europe," contained already in the Treaty of Rome, from the Directive's content it is clear that it did not understand this goal primarily in cultural terms. The commentators agree that the cultural objectives are "a lesser element of The Directive," and the economic and industrial rationales, above all "removing obstacles to freedom of movement for services" and "ensuring that competition in the common market is not distorted," constitute its core elements (David Graham and Assoc. Ltd., 2005, p. 76). Policy measures regarding cultural goals are largely implicit, and European identity or consciousness is not mentioned at all. In fact, the only place in the Directive referring specifically to cultural objectives is in Recital 13 of the TWF Directive, which assures that the provisions of the TWF Directive do not affect "the independence of cultural developments in the Member States and the preservation of cultural diversity in the Community" (European Council, 1989). It remains unspecified what kind of cultural policy is reflected in the Directive's well-known and much-debated Articles 4 and 5. These articles are generally regarded as its main cultural provisions, requesting that broadcasters reserve "for European works [...] a majority proportion of their transmission time," and "at least 10% of their transmission time [...] for European works created by producers who are independent of broadcasters" (European Council, 1989).

It is often pointed out that the conceptual ambivalences within the TWF Directive, which is seen as a predominantly liberalizing

instrument (Wheeler, 2004) but which nevertheless contains restrictive measures such as the above-mentioned content quotas, are to a great extent products of competition between what Richard Collins (2002) calls “rival policy paradigms” of the European Community’s broadcasting and audiovisual policy. This policy is divided not just between the European Commission and the Parliament, but within the various Directorates of the European Commission itself, and is usually described as a struggle between liberals/deregulators, whose objectives are mainly economic (creating a single European audiovisual market), and “dirigistes/interventionists,” who are trying to promote cultural objectives in the EU media legislation (Collins, 2002, p. 14). Therefore, many products of the legislative process are results of some sort of compromise (whose particular form depends, of course, on actual distribution of powers). One example is precisely the formulation of Articles 4 and 5, containing in both cases the (in)famous escape clause “where practicable,” which enables the broadcasters to comfortably slip away from the quota requirements if they can reasonably justify that they are unable to fulfill them.

Nevertheless, even within the “dirigistes/interventionists” camp, the notion of what the aims of the cultural policy should be and how they should be achieved has apparently changed over time. As David Levy observes, the “early emphasis on the role of audio-visual policy in creating a European identity did not last long,” moving in the 1980s away from attempts to create, by broadcasting regulation, a single European identity, and shifting more towards preservation of existing cultural diversity, which was understood largely in terms of variety of national cultures (Levy, 2001, p. 42). According to Collins (2002), the European policymakers have gradually replaced the aim of creating a (more or less unified) European culture with the concern about the role of the media in preserving Europe’s existing cultural diversity. The “spirit” of the Hahn report (and, to some extent, of the 1984 Green Paper), largely faded away at the end of 1989, and “the arguments which dirigistes deployed in favor of regulation and intervention came to emphasize European cultural diversity rather than the European union and cultural unity” (Collins, 2002, p. 16). As Monica Sassatelli (2002, p. 438) argues, this shifting of emphasis from “unity” to “diversity” characterizes not just the development in the field of audiovisual policy, but recent EU policy in general.⁴ This can hardly be

demonstrated better than by the fact that the EU has adopted the slogan *Unity in Diversity* as its official motto, which, as Sassatelli assumes, enables the EU “to avoid filling in the idea of the European cultural corpus with specific elements” (Sassatelli, 2002, p. 438).

6.2. “Daytime is American, primetime is domestic”—and what about European?

In the Seventh Communication on the application of Articles 4 and 5 of the TWF Directive (European Commission, 2006d), which analyzes and evaluates data provided by the particular national regulatory bodies for the years 2003–2004, the Commission expressed general satisfaction with the state of the European audiovisual industry (measured by the growth of channels), as well as with national applications of the provisions concerning quota on European and independent works. According to the Commission, these have been “comfortably met over the current reference period (2003–2004), as in previous reporting periods, both at the European level and at the level of Member States, including the ten Member States which joined the EU in 2004” (European Commission, 2006d, p. 9). This kind of evaluation is based on several figures. Concerning the European works, the number representing the EU-average transmission time reserved for European works by all covered channels in all Member States reached 63.3 percent in 2004, which was a slight decrease from the previous year (65.2 percent). Still, according to the Commission, this figure provides a “generally sound application of Article 4.”⁵ The average compliance rate for all channels in all Member States reached 72.8 percent in 2004, representing a 4.6 percent increase from 2003.⁶ This implies that three out of four European channels falling within TWF jurisdiction have surpassed the required 50 percent threshold. Regarding the European works by independent producers, the EU-average proportion reserved for these kinds of programs by all covered channels in all Member States was 31.5 percent in 2004, which is well above the 10 percent threshold; the EU-average compliance rate for channels in all Member States increased from 78.4 percent in 2003 to 81.9 percent in 2004.

So despite the fact that in 2004, every fourth TV channel in the EU did not actually reach the 50 percent minimum share of European

works, the Commission's evaluation is optimistic overall, pointing to the satisfactory "mid-term trend" concerning the proportion of European works,⁷ especially since the numbers proved that the new Member States achieved, in terms of scheduling European works, comparable results to those reached by the EU-15 countries.⁸

However, in order to fully evaluate the effect of Articles 4 and 5 of the TWF Directive, such a narrow mathematical perspective (based on an arithmetic mean) is not sufficient. While confirming the positive trends concerning the share of European and independent works across the EU, an independent Impact Study assessing the results of the TWF Directive (David Graham and Assoc. Ltd., 2005) pointed to several major problems in the current application and evaluation of the Directive. The first one, actually noted by the Commission itself, concerns rather weak results in enforcing the Directive's provisions by the national regulatory bodies. In the background document to the same Communication (European Commission, 2006e), the Commission mentions that regulatory bodies of Member States take no measures in cases where their channels fail to achieve the quota limits:

"Various types of measures were reported by Member States: ongoing dialogue, subjecting the channels concerned to surveillance, formal notices and other sanctions against broadcasters, which may result in fines or—ultimately—in the withdrawal of the license. However, there were very few cases where these measures were actually taken" (European Commission, 2006e, p. 20).

As the independent Impact Study found out from a survey of producers and broadcasters across the EU, a majority of them do not believe that Articles 4 and 5 are strictly monitored or that sanctions will be applied against those who fail to meet the quota requirements. According to this study, 59 percent of broadcasters and 79 percent of producers believe that sanctions are never applied. On the contrary, "only 26 percent of broadcasters and 10 percent of producers said they believed that the sanctions were an effective means of securing adherence by broadcasters to the requirements of Articles 4 and 5" (David Graham and Assoc. Ltd., 2005, p. 169). Of course, these findings create space for doubts about the effectiveness of these policy provisions and about their real impact on the decisions of broadcasters in regards to their TV's programming schedules.

The second serious shortcoming in the allegedly cultural provisions of the TWF Directive concerns the fact that the Directive, in its definition of “European works,” does not distinguish between domestic and non-domestic European programs. This enables the broadcasters to comply with Article 4 without devoting even a minute to programs from another European country. This theoretical example is actually not too far from the actual state of affairs across the European television market. As the independent Impact Study shows, while the average share of qualifying transmission time devoted to non-domestic European works increased from 10.9 percent in 1993 to 13.9 percent in 1999, it has subsequently fallen to 12.3 percent in 2002 (David Graham and Assoc. Ltd., 2005, p. 183). These numbers obviously lower prospects for nurturing a European cultural identity through the mutual exchange of television programs between EU countries. And these numbers confirm that despite the TWF Directive’s lifting of technical and legislative barriers to transborder television, the cultural and linguistic barriers dividing Europe still remain very powerful factors in determining audiences’ viewing habits. The recent report by the European Audiovisual Observatory (EAO) further underlines this trend, when demonstrating “a considerable fall in co-production” among European countries within the last several years, resulting in the fact that “beginning in 2000, the international component in national European fiction has decreased and has become more domestic and local than ever,” which is “somewhat paradoxical given an era of globalization and inter-culturality” (EAO, 2005, p. 65).⁹

It is even more noteworthy—from a cultural as well as purely economic perspective—that the only programs that have consistently been able to cross all the European borders are fiction programs and feature films from the United States. This is certainly not a new phenomenon; it has been documented throughout the 1980s and 1990s (Silj, 1989; De Bens and de Smaele, 2001; Tunstall and Machin, 1999). It was precisely this growing inability of European fiction producers to compete with American films and soap operas that provided one of the key arguments for placing Article 4 in the TWF Directive eighteen years ago. The United States continues to occupy a dominant position in imports of television fiction and feature films across Europe (EAO, 2005, p. 65), and the deficit in import and export of audiovisual products

between the EU and the United States has further increased (in 2002 it equaled €1.75 billion—David Graham and Assoc. Ltd., 2005, p. 10). This situation represents a third major problem that has to be considered when assessing the cultural impact of the TWF Directive. Even though the share of U.S. fiction programs has recently declined, falling from 71.8 percent of total imports in 1998 to 62.3 percent in 2004 in the five key media markets in Europe (EAO, 2005, p. 94),¹⁰ it has been offset by an increase in U.S. participation in international co-productions, rising from 3.1 percent of the total in 1998 to 13.4 percent in 2004 (EAO, 2005, p. 94).¹¹ Between 1996 and 2002, the amount of U.S. content on European TV screens increased twice as fast as European fiction, totaling 28,869 hours compared to 14,670 hours broadcast (Chalaby, 2006, pp. 40–41).

At the dawn of the new regulatory regime for audiovisual media, the key pattern in television fiction in Europe is characterized as “daytime is American—primetime is domestic” (EAO, 2005, p. 66). Programming from other European countries is usually only a third choice (Collins, 2002, p. 32), and, as has been demonstrated above, even that occurs only relatively rarely. And although the share of European fiction has in fact been steadily increasing, it is downgraded by the parallel reduction of titles, constituting a trend that the European Audiovisual Observatory calls “more of the same” (EAO, 2005, p. 65).¹²

Given the above results of the cultural objectives of the TWF Directive (whether implicit or explicit), it is easy to understand why most of the academic commentators criticized it. For Mira Burri Nenova, the Directive “has done little for the achievement of cultural goals” and was instead a “victory for commercial forces and those who favored anti-protectionist policies” (Nenova, 2007, p. 9). For Jean Chalaby, policy initiatives like the TWF Directive “have failed to stem the flow of US material, and in a few cases have proven counter-effective.” Instead of helping to develop a European film and television production industry, the TWF Directive “provided Hollywood with a larger market and a host of new clients desperate to fill hours with cheap television material” (Chalaby, 2006, p. 48). Richard Collins observes the failure of both the economic and cultural objectives, saying that “the single market in broadcasting has neither improved the competitive position of European audiovisual producers by giving them a domestic

market comparable to that of the United States, nor bound European television viewers into a common culture and thus promoted European Union” (Collins, 2002, p. 19).

6.3. Implementing the TWF Directive into the Czech broadcasting legislation

In the Czech Republic, the European Community’s audiovisual *acquis communautaire* represented by the TWF Directive was put into the national legislation by the 2001 Radio and Television Broadcasting Act (hereafter, RTB Act). It was adopted three years before the country’s entry into the EU, which gave the stations a relatively long time to adapt themselves to the quota requirements. Concerning Articles 4 and 5, demanding the promotion of European and “independent” works, the Czech Republic, unlike some other European states,¹³ decided on a quite literary transcription of the Directive’s text, not choosing the option of increasing the quotas, which the Directive explicitly permits. The Act requires broadcasting for “more than a half” of the total qualifying time (TQT) for every single channel, retaining the exemption clause “where practicable.”¹⁴ Concerning European works by independent producers, the RTB Act copies the original TWF Directive when obliging the broadcasters either to fulfill the minimum 10 percent of the TQT or to spend at least 10 percent of their program budget on programs from independent producers. The definition of total qualifying time is also transcribed directly, excluding news, sports events, games, advertising, teletext services, and teleshopping.¹⁵ The only provision that sets additional quotas concerns the amount of “new programs” (programs not older than five years). This amount the TWF Directive leaves unspecified, using the phrase “an adequate proportion,” but the Czech RTB Act specifies it as 10 percent of the qualifying transmission time of works from independent producers or, alternatively, as 10 percent of the broadcaster’s program budget for works defined this way. Unlike most of the EU 15 countries, which require the broadcasters to broadcast for a certain amount of time in the national language or in the language of ethnic minorities, the Czech Republic has neither a specific language nor other “cultural” requirements in its RTB Act.¹⁶ The only paragraph where the Act mentions

the subject of culture is §17, which lists certain facts significant for the decision of granting the license, among them a “contribution of the applier to securing development of the culture of national, ethnic or other minorities in the Czech Republic,” but does not set any criteria for the broadcaster to fulfill this obligation. The Act does also not require the broadcasters to contribute financially to domestic TV or film production, as is the case in France, Austria, or Finland.¹⁷ An attempt to adopt such an act was recently passed through Parliament but eventually vetoed by President Václav Klaus.

In sum, the implementation of Articles 4 and 5 of the TWF Directive in the Czech legislation could be characterized by a rather liberal approach, keeping the flexibility of the original wording of the Directive while not putting any additional requirements on the broadcasters concerning promotion of European or independent works. In light of the analytical model developed by the authors of the independent “Study of Measures Concerning the Promotion of Distribution and Production of TV Programmes” (David Graham and Assoc. Ltd., 2005), this would probably put the Czech Republic in the company of Austria, Denmark, Germany, or Ireland, whose implementation mode combines flexible application of the Directive with low additional requirements on broadcasters. By contrast, another group of countries (Belgium, Finland, France, Italy, Portugal, and the United Kingdom) opted for a prescriptive Directive’s application and place additional content requirements on their respective broadcasters.¹⁸

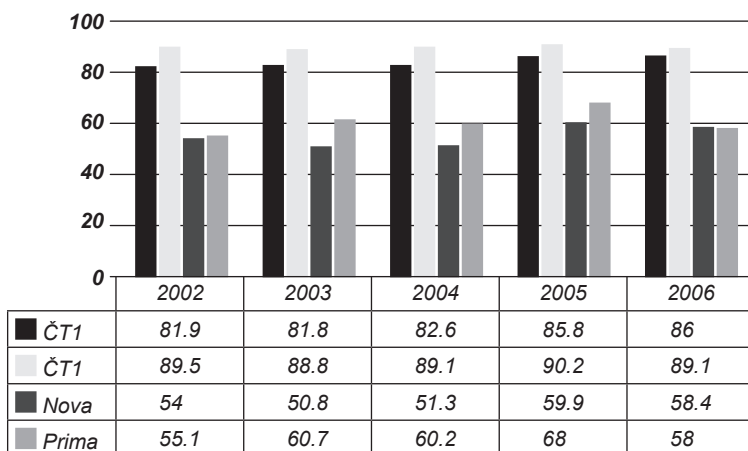
6.4. Program quotas and the Czech television market

Since 2001, the year of the adoption of the current Radio and Television Broadcasting Act, the Czech Council for Radio and Television Broadcasting (the national regulation authority, hereafter CRTB) has been monitoring the implementation of Articles 4 and 5 (which are inscribed into paragraphs 42, 43, and 44 of the RTB Act) and publishing the results of the monitoring procedure in its annual reports. The data from five consecutive years show that all of the four main national terrestrial channels falling within the jurisdiction of these articles (from which the local stations as well as stations broadcasting predominantly in foreign languages are exempt)¹⁹ have thus far always fulfilled the

requirement of devoting more than half of the qualifying time for European works. This task has apparently been much easier for the public service broadcaster Česká Televize with its channels ČT1 and ČT2, surpassing the 50 percent threshold comfortably (86 percent in the case of ČT1 and 89 percent in the case of ČT2 in 2006). Its commercial competitors showed more difficulties in the beginning (TV Nova, the Czech market leader, managed to get just above the required minimum in 2003), but in the last couple of years they also have not had substantial problems in meeting the quota.

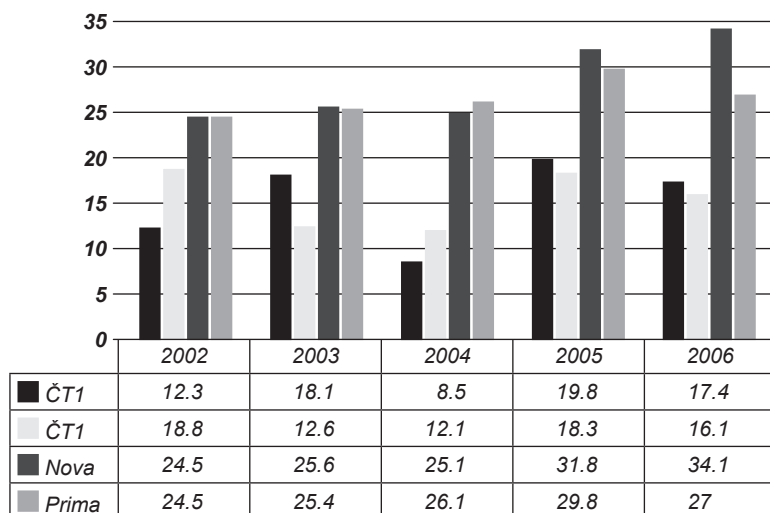
Regarding independent programming, with only one exception, the main Czech national terrestrial stations have also been able to keep meeting the required 10 percent quota. However, this time, it has been the public service channels struggling on several occasions to get over the threshold, while the commercial stations TV Nova and TV Prima managed to fill almost a third of their qualifying broadcasting time with programs from independent producers. In 2004 the works by independent producers accounted for only 8.5 percent of the total qualifying time on the public service channel ČT1, which, in the report to the European Commission, was explained by the broadcaster's

Figure 6.1. Share of European programming on the main Czech national terrestrial TV stations (in %)



Source: Czech Council for Radio and Television Broadcasting: annual reports 2002–2006 (<http://www.rrtv.cz/cz/static/zpravy/index.htm>; retrieved 6.04. 2007).

Figure 6.2. Share of programming from independent producers on the main Czech national terrestrial TV stations (in %)



Source: Czech Council for Radio and Television Broadcasting: annual reports 2002–2006 (<http://www.rrtv.cz/cz/static/zpravy/index.htm>; retrieved 6.04. 2007).

mistake in defining an independent producer (European Commission, 2006d).

Nevertheless, this picture of unproblematic compliance gets more complicated when adding the cable and satellite channels which, according to both the TWF Directive as well as the Czech RTB Act, are also subject to the program quota requirements. In its 2004 report to the Commission, the CRTB provided information on the programming of twelve channels for the period between May 1, 2004 (the date of the Czech Republic's EU accession) and December 31, 2004, of which five channels did not meet the required quota for European works. The inclusion of these pay TV channels, all of which belong to the HBO Company, in the overall results for the country resulted in an average of 49.1 percent of broadcasting time devoted to European works in the Czech Republic in 2004. This meant that, in the words of the Commission, "the Czech Republic is the only Member State whose channels, counted together, did not average over 50%" that year (European Commission, 2006e, p. 24). Despite the CRTB's proclaimed determination "to enter into dialogue with the broadcasters in order to improve

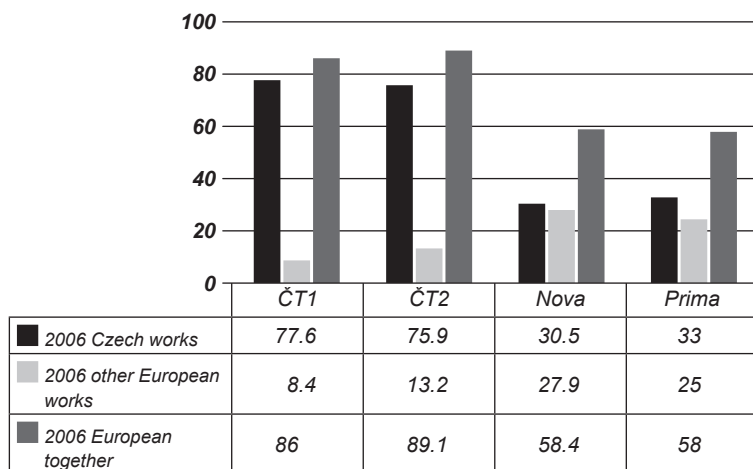
the situation” (European Commission 2006e, p. 56), the data from the 2006 annual report show that the respective pay TV channels (most notably HBO, HBO 2, and Cinemax) are still far from reaching both the 50 percent quota on European programming as well as the 10 percent quota on independent programs. Whereas in 2005, these broadcasters offered an explanation for why they could not reach the quota,²⁰ the following year no reasons were even provided, although the share of neither European nor independent programming had increased substantially. This case only deepens doubts about the determination of the broadcasting authorities to truly enforce the compliance to the program quotas—which is apparently a common problem across most of the European countries.²¹ The issue of quota compliance has, after all, never been discussed at the CRTB’s official meetings so far (at least not according to the publicly accessible records from these meetings).²²

6.5. Czech audience’s tastes: in favor of domestic programming

Looking at the numbers representing the share of European programs on the main national channels, it is tempting to agree with the Czech broadcasting council’s positive evaluation of the performance of these channels in terms of fulfilling the requirements set by the TWF Directive (see Czech Council for Television and Radio Broadcasting, 2007). However, a closer examination of the data from 2006, when broadcasters were first asked by the Council to provide information about the separate shares of Czech and other European programs, reveals that the majority of programs subsumed under the category “European” are of domestic origin. This is much more prominent in the case of the public service channels ČT1 and ČT2, where the share of non-domestic European works reached only 8.4 percent (13.2 percent respectively) in 2006, while more than three-quarters of their total qualifying time was filled with national programming.

As can be seen, the commercial television channels displayed more balanced proportions between Czech and other European works than the public service ones, most prominently in case of TV Nova. However, this station also broadcast the most co-produced programs, the majority of which actually involved non-European (predominantly U.S.)

Figure 6.3. Proportion of domestic and non-domestic European programming on the main Czech national terrestrial TV stations (in %)



Source: Czech Council for Radio and Television Broadcasting: annual reports 2002–2006 (<http://www.rrtv.cz/cz/static/zpravy/index.htm>; retrieved 6.04. 2006).

partners. This should also be taken into account when evaluating the chart presented above.²³

The uneven position of domestic and non-domestic European programs can be further demonstrated in the way they are scheduled and in the figures which represent audience ratings. The secondary analysis of the peplemeter data confirms the above-discussed dominance of domestic over international programming in terms of audience response to it, as well as dominance of American over non-domestic European programming. On the three main national terrestrial channels in the Czech Republic, domestic programs “rule” the prime-time program schedules (8–11 p.m.) and usually attract the largest share of the audience. As can be seen from the following chart, non-domestic programs are hardly ever among the most watched ones, and it is the U.S. programs that are usually the audience’s “second choice.”

The differences between the most successful domestic, European, and U.S. programs, both in terms of their amount and their audience ratings, are obvious. On the public service channel ČT1, only four U.S. American programs appear among the first 100, measured by the

Table 6.1. Proportion of domestic and international production among the top 100 prime-time programs broadcast in prime time on the main Czech national TV stations (sample: 03,06,09,12/2006)

TV station	Domestic programs		Non-domestic European programs		U.S. programs	
	Nr. of programs in top 100	Top ranking / audience rating	Nr. of programs in top 100	Top ranking / audience rating	Nr. of programs in top 100	Top ranking / audience rating
ČT1	96	1./28.5 %	0	0	4	49./13.7 %
Nova	83	1./28.3 %	4	41./24.4 %	13	58./22.3 %
Prima	95	1./17.8 %	1	80./9.6 %	4	20./14.1 %

Source: ATO – Mediaresearch, s.r.o. (<http://www.ato.cz>; retrieved 6.04.2007).

Notes: The chart includes only programs falling within the definition according to the TWF Directive (fiction, films and talk shows)

program's audience ratings (the movie *Ice Age* being the most popular, with 13.7 percent), but none of a non-domestic European origin. The results from the commercial TV channel Prima are almost similar, with *Desperate Housewives* reaching the Top 20 as the only non-domestic program.²⁴ There were four European programs among the first 100 on the TV channel Nova (the most successful of which was the German crime series *Cobra 11*), but thirteen American ones, mostly series that were popular worldwide, such as *Lost*, *Las Vegas*, and *CSI: Miami*.

In light of these figures (also complemented by the next chart), there can be no doubt that the above-mentioned cross-European pattern characterized by the words “prime time is domestic” (EAO, 2005, p. 66) describes the situation in the Czech Republic's television landscape as well. Notwithstanding the EU's efforts to stimulate the growth of the pan-European broadcasting market and to promote the exchange of audiovisual programs, the Czech television landscape is dominated by a combination of national and U.S. production, and the Czech audience remains “locked” in nationally oriented viewing habits (especially during prime time), having neither the opportunity nor an apparent interest to watch programs from the fellow EU states. The presumption that the implementation of EU media legislation

will “broaden the spectrum of geographic origin of broadcasted programs,” as the text of the official government’s cultural policy proclamation hoped for (Ministry of Culture, 2001), simply was not confirmed.

6.6. Prime-time fiction on Czech screens: Whither diversity?

Judging by the objectives inscribed in the text of the TWF Directive, which conflate “European” with “national,” this situation does not seem to pose a problem in itself. However, following the logic of the “Unity in Diversity” argument, the question is how the Czech domestic TV programs contribute to the preservation of European cultural diversity, or, in other words, what kind of nation-specific cultural representations and values are currently present on Czech television screens. This, of course, is a complicated question, calling perhaps for a different, much more subtle type of analysis. Nevertheless, a brief look at the most popular TV fiction programs in 2006 casts some doubts about the Czech television programs being an important addition to the European cultural heritage, however it is defined.

Apart from the two feature films (both of them fairy tales broadcast during Christmas), the most popular Czech prime time programs are domestic soap operas and reality shows, which corresponds to the current Europe-wide trend (see EAO, 2005).²⁵ In this context, one can speak of (structural or formal) homogenization rather than heterogenization or cultural pluralization, especially since most of the reality TV shows broadcast on Czech screens are in fact global—not just European—formats that bring the same type of entertainment (although always “localized”) to audiences of millions around the world (see Moran and Keane, 2003) and can be regarded as one of the most visible examples of cultural globalization.²⁶ And even though the domestic soap operas probably exploit national narratives and other national symbolic material more intensely than the reality shows, and could be generally regarded more “genuine” products of the nation’s own television industries, their cultural value can be questioned just as much as in the case of reality shows.

However, it is precisely the issue of “quality” of the program content which is virtually absent in the European media policy discourse.

Table 6.2. Prime-time fiction programs which achieved highest audience ratings on three main Czech national TVs (sample 03,06,09,12/2006; highest episode's ratings)

Channel / title of the program	Country of origin	Genre	Rating (%)	Share (%)
TV Nova (commercial)			(15 +)	(15 +)
Misto v životě [Place in Life]	Czech Rep.	Soap opera	28.3	52.3
Pojišťovna štěstí [Happiness Insurance]	Czech Rep.	Soap opera	27.5	56.8
Česko hledá SuperStar III (<i>Pop Idol</i>)	Czech Rep.	Reality TV / factual entert.	27	50.6
Ordinace v růžové zahradě [Rose Garden Hospital]	Czech Rep.	Soap opera	25.7	49.6
Výměna manželek (<i>Wife Swap</i>)	Czech Rep.	Reality TV / factual entert.	24.6	47.3
TV Prima (commercial)				
Byl jednou jeden král [Once upon a time there was a king]	Czech Rep.	Feature film	17.8	37.9
Rodinná pouta II [Family Ties]	Czech Rep.	Soap opera	17.2	31.6
Letiště [Airport]	Czech Rep.	Soap opera	15.4	35.4
Chůva v akci (<i>Supermamy</i>)	Czech Rep.	Reality TV / factual entert.	13.2	27.8
VyVolení – Finále (<i>Big Brother</i>)	Czech Rep.	Reality TV / factual entert.	12.5	33.1
ČT 1 (public-service)				
Anděl Páně [Lord's Angel]	Czech Rep.	Feature film	28.5	61.8
StarDance ...když hvězdy tančí (<i>Dancing with the Stars</i>)	Czech Rep.	Reality TV / factual entert.	26.8	51
Četnické humoresky [Police Humoresques]	Czech Rep.	Crime series	25	49.7
Náves [Village Square]	Czech Rep.	Soap opera	22.1	43.3
Hodina pravdy (<i>Family Feud</i>)	Czech Rep.	Reality TV / factual entert.	17.8	36.3

Source: ATO – Mediaresearch, s.r.o. (<http://www.ato.cz>; retrieved 6.04.2007)

Notes: Titles in italic stand for original format titles.

As Phillip Schlesinger points out, this discourse treats culture in a very general way, not distinguishing among “high,” “low,” or “popular” culture. The analytical distinction between “culture as a way of life”

(broadly shared values, practices, and beliefs of a social group) and the (narrower) understanding of culture as “production of artifacts that may become commodities traded in a marketplace” (Schlesinger, 1997, pp. 371–372) gets conflated in the rhetoric of EU policy makers. This means that the popular television products are automatically ascribed an invaluable role in both representing and reproducing specificities of the “way of life” of a given national community, and are therefore worth protecting on a European level.²⁷ There is not enough space in this paper to examine all the shortcomings contained in such an argument; however, the very idea that—for example—a dozen national versions of *Big Brother* or *Survivor* reality shows will somehow reflect/promote the diversity of European cultures, demonstrate sufficiently the myopia of the program quota policy in regards to the issues of content, as well as the dubious results of a policy combining purely economic rationales with the rhetoric of cultural defense.

6.7. The Audiovisual Media Services Directive and the issue of cultural diversity

As has already been mentioned in the introduction to this chapter, the Television without Frontiers Directive was replaced at the end of 2007 by a new Audiovisual Media Services Directive (hereafter AVMS Directive; see European Parliament and the Council, 2007).²⁸ According to the European Commission, the main reason for introducing the new Directive is to update the legislation regulating the audiovisual field in response to the rapid technological development this field has witnessed in recent years (especially regarding the introduction of new broadcasting platforms, such as digital television, Internet protocol TV, mobile video services, and video on demand, as well as new advertising methods). The new Directive aims to “achieve a modern, flexible and simplified framework for audiovisual media content,”²⁹ and by means like relaxing the rules on advertising in TV products (for example by abolishing the existing daily limit of three hours of advertising) or authorizing the use of product placement (defined by a clear legal framework), it hopes to “boost Europe’s creative economy” and “increase choice, diversity and investment in Europe’s audiovisual media industry.”³⁰ The crucial innovation, however, lies in a new definition of

audiovisual media services, which are divided between “linear” services (offering content on the basis of program schedule, i.e. “traditional” TV broadcasting, “pushing” content to the viewers) and “non-linear” services (offering content in a form of a catalogue from which the consumer chooses, i.e. video on demand). This distinction in the type of media services corresponds to the two-tier system of regulation, applying “stricter” provisions of the AVMS Directive exclusively to the linear media sector, while imposing only minimum obligations on the providers of non-linear media (which concern especially protection of minors and human dignity, protection of consumers, prevention of racial and sexual hatred, and the right to reply).³¹

Cultural diversity—its protection and promotion—is also stressed as one of the most prominent goals the new Directive is supposed to achieve, both in various publicly available materials of the European Commission and its officials, explaining and legitimizing its introduction,³² as well as in the very text of the AVMS Directive, emphasizing (on the surface) cultural diversity as a specific value which the new legislation aims to safeguard. Comparing the final version with the original Commission’s proposal (European Commission, 2005e) and with the version adopted by the European Parliament (European Commission and European Parliament 2007), it is clear that most of the “cultural” passages were amended into it by the Parliament. In Recital 1, the new Directive is legitimized by the emergence of “new technologies” and aims to “ensure optimal conditions of competitiveness and legal certainty for Europe’s information technologies and its media industries and services.” However, the Parliament extended this sentence by adding words “as well as respect for cultural and linguistic diversity.” Another change concerning the issue of cultural diversity is contained in Recital 3, where the Commission’s original text “The importance of audiovisual media services for societies, democracy and culture justifies the application of specific rules to these services” (European Commission, 2005e) has been revised and enlarged by a sentence explicitly stating that “Audiovisual media services are as much cultural goods as they are economic goods” (European Parliament and the Council, 2007). The “spirit” of this phrase is further conveyed—and substantially elaborated—in Recital 5, which can be seen as another effort of the European Parliament to symbolically strengthen the cultural dimension of the new legislation. Recital 5, which was not

contained in the initial Commission's proposal, reminds of the international framework for affirmation of cultural diversity, represented by the Convention on the protection and promotion of the diversity of cultural expression, which was adopted by the UNESCO General Conference on October 20, 2005, and then by the EU on December 18, 2006, as well as by negotiations of the EU with seventeen members of the World Trade Organization (WTO) on the modifications of trade commitments in services under the General Agreement on Trade in Services (GATS), which effectively secured the exclusion of audiovisual content from these commitments.³³

However, despite these comforting proclamations about cultural diversity in the recitals, the new AVMS Directive does not represent any real progress in terms of defining what kind of culture has to be protected, what kind of diversity should be nurtured, and, most importantly, how these objectives should be achieved in practice. Building upon its legislative predecessor, the new Directive leaves intact the provisions concerning the quotas for European and independent works (Articles 4 and 5), which not only the Commission itself but also the majority of European broadcasters apparently see as an effective tool for promotion of cultural diversity which should be maintained in the future.³⁴ However, these quotas—retaining, of course, the old “where practicable” principle—are only valid for the linear services, while the entire sphere of on-demand media, whose increasing importance was one of the main reasons for revising the TWF Directive, is left with a set of vague recommendations regarding “production of and access to European works.”³⁵ Article 3i of the AVMS Directive states that “Such promotion could relate, inter alia, to the financial contribution made by such services to the production and rights acquisition of European works or to the share and/or prominence of European works in the catalogue of programs offered by the on-demand audiovisual media service” (European Parliament and the Council, 2007) and assigns the Member States the duty to report on the implementation of this paragraph (which should also be examined by an independent study). No matter how evasive the wording of this article already is, its effectiveness and practical impact is put in question even further by inserting the clause “where practicable and by appropriate means,” already known from Articles 4 and 5 regulating television broadcasting. Since it has already been difficult for the EU to truly enforce compliance to the relatively

firmly defined program quotas, it is hard to imagine that the “encouragement to promote European works in non-linear media environment” (as this provision is internally termed by the Commission, see European Commission, 2005e) quoted above could be understood by national broadcasting authorities as something more than rhetoric.

6.8. Conclusion

In the first part of this paper, I attempted to demonstrate how the rhetoric of the European audiovisual policy has moved away from concentrating on the role of broadcasting media in representing shared European culture and nurturing a common European identity, which it has characterized at the beginning of pan-European media regulation history, towards emphasizing their importance for preserving the unique character of various European cultures and thereby for promoting European “cultural diversity.” However, this objective remains largely unspecified. Both the text of the TWF Directive as well as recent reports about the compliance of the European TV broadcasters with the Directive’s main “cultural provisions”—the quotas on the proportion of European and independent works—suggest that cultural diversity is largely conceptualized in national terms and should be achieved by proliferation of national audiovisual industries across Europe. The new Audiovisual Media Services Directive (European Parliament and the Council, 2007), despite being advertised by the European Commission as a major innovation in European media regulation, seems to be built upon the very same principles.

As I have tried to point out in this paper, this approach contains several shortcomings, reaching from the market-driven and territorially reductionist notion of culture, which the analyzed legislation deals with only in relation to the particular nation-state (not recognizing language, ethnic, or religious diversity *within* the nation-states themselves), to the virtual resignation on the attempts to challenge the national viewing habits and to enable the national television audiences across Europe with more opportunities to confront their own lifestyles and collective imageries, as they are portrayed on their screens, with the ones from their fellow European countries. The lack of true diversity (regarding the land of origin as well as content) on television

channels and the failure of the TWF Directive to stimulate the cross-border exchange of programs was empirically demonstrated on the Czech TV market, which has in recent years been dominated by nationally oriented type of programming (even if containing an important share of local versions of various global TV formats), while the non-national European programming has been more or less silenced. The compliance to the TWF Directive's program quotas, which the main Czech national channels have been comfortably able to achieve (although without any proven relationship between the compliance and the respective legislative measures), says very little about what the people are actually watching on their TV screens, and practically nothing about how should the Czech TV culture reflect or even enrich the assumed European cultural heritage.

Although this paper was not aimed at comparative analysis and dealt with a limited range of data, its findings indicate that the predominance of domestic programming and nation-oriented viewing patterns is a common characteristic of the European television landscape. This circumstance has resulted in Europe's audiovisual fragmentation (rather than unification) and the state of media and audiences' national particularism, which is bridged only by American series and films or by (global) television formats. It is difficult to imagine that the coming technological transformation of the audiovisual field, the "digital revolution" (Levy, 2001), should somehow reverse this trend. If anything, it is usually being associated with intensifying processes of cultural and identity fragmentation. Contrary to Phillip Schlesinger's observation that "the more the EU begins to behave like a federal political formation, the more it will need to define a supranational cultural policy" (Schlesinger, 1997, p. 371), the provisions contained in the new Audiovisual Media Services Directive do not represent a step in this direction. They are driven mainly by the economic needs of the European audiovisual industries. They do not give the cultural aspects of television broadcasting and its potential for enhancing cultural diversity, or even establishment of European identity, any more *real* attention than the Directive's legislative predecessor. If there is not enough political will to deal with these issues now—at the dawn of the digital TV era—then in the future European regulators will very likely find the task of bringing cultural objectives back into the picture even more difficult, that is, if this task is even up for discussion at all.

NOTES

¹ The text is a revised, updated, and extended version of the paper “Promoting Diversity, or Protecting National Culture? Television without Frontiers Directive in the Context of the Czech Television Landscape.” It was first presented at the conference “Comparing Media Systems: East Meets West” at the Kliczkow Castle, Poland (April 23–25, 2007), and subsequently published in a post-conference volume (see Štětka, 2008).

² In the Maastricht Treaty, the audiovisual sector is specifically referred to in the second paragraph of Article 151: “Action by the Community shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:

- improvement of the knowledge and dissemination of the culture and history of European peoples;
- conservation and safeguarding of cultural heritage of European significance;
- non-commercial cultural exchanges;
- artistic and literary creation, including in the audiovisual sector” (European Union, 1992).

³ In its well-known statement, the resolution noted that for a European identity to emerge, the flow of information needs to be freed from national constraints: “European unification will only be achieved if Europeans want it. Europeans will only want it if there is such a thing as a European identity. A European identity will only develop if Europeans are adequately informed. At present, information vis à vis the mass media is controlled at national level” (qtd. from Collins, 2002, p. 13).

⁴ According to Gerard Delanty and Chris Rumford, the concept of Unity in Diversity is “currently the most influential expression of European identity” (Delanty and Rumford, 2005, p. 56).

⁵ At a Member State level, the average transmission time varied between 52.8 percent (Ireland) and 86.2 percent (Denmark) in 2003 and between 49.1 percent (Czech Republic) and 86.3 percent (Denmark) in 2004 (European Commission, 2006d).

⁶ The Member States’ average compliance rates for all channels covered ranged from 50 percent (Belgium and Ireland) to 100 percent (Finland) in 2003 and from 45 percent (UK) to 100 percent (Estonia, Latvia, Malta, and Slovakia) in 2004 (European Commission, 2006d).

⁷ Scheduling of European works has stabilized in the EU at a level well above 60 percent of total qualifying transmission time (European Commission, 2006d).

⁸ The new Member States had a combined average transmission of 61.8 percent of European works in the post-accession period—from May 1 to December 31, 2004 (European Commission, 2006d).

⁹ The European Audiovisual Observatory noted that “In the five largest countries, European drama (non-national) has had great difficulty circulating

over the years. For example, there is almost total resistance to European imports in the two Anglo-Saxon countries" (EAO, 2005, p. 66).

¹⁰ These markets correspond with the five largest economies of the EU—the United Kingdom, Germany, France, Italy, and Spain (EAO, 2005, p. 66). In 2002, 65.1 percent of imported fiction in Western Europe came from the United States, 15.8 percent from the region, and 12.4 percent from the rest of the world (Chalaby, 2006, p. 39).

¹¹ As the European Audiovisual Observatory noted, "while these [co-productions] sometimes involve the participation of a European producer, it is more than likely that most are based on initiatives originated by North American companies" (EAO, 2005, p. 94).

¹² This assessment is made also on the basis of the fall in new programs offered during the course of the year; the number of them fell from 844 to 816, reaching the lowest threshold of the four-year period 2001–2004 (EAO, 2005, p. 65).

¹³ According to the report by David Graham and Assoc. Ltd. (2005, pp. 95–96), six of the "old" EU Member States—Finland, France, Italy, the Netherlands, Spain, and the United Kingdom—apply higher percentage requirements than those contained in the Directive on some (or all) of their broadcasters.

¹⁴ The EU 15 countries differ in whether they have incorporated the "where practicable" clause into their national legislations. According to David Graham and Assoc. Ltd. (2005, p. 90), Austria, Belgium, Luxembourg, Spain, and Sweden are among those who have included these words in their broadcasting acts, while others have not, choosing the less "flexible" interpretation of the TWF Directive. Some states (Austria, Belgium, France, Luxembourg, and Spain) have also included a "nonslipback clause" in their legislation concerning European programs, which demands that "broadcasters cannot show a lower proportion of European works than in the previous year" (David Graham and Assoc. Ltd., 2005, p. 90).

¹⁵ This definition is contained in most of the EU 15 countries, except for France, Germany, Italy, and the United Kingdom, which adopted stricter definitions by excluding programming likely to be produced domestically, like talk shows or current-affairs programs (David Graham and Assoc. Ltd., 2005, p. 89).

¹⁶ In Greece, for example, 25 percent of the TQT should be reserved for works produced in Greek; in the Netherlands, public service broadcasters are required to devote 50 percent of TQT to programs in Dutch or Friesian (private channels 40 percent only); in Sweden, 55 percent of the program budget of the public service broadcaster SVT has to be spent with producers based in Sweden (David Graham and Assoc. Ltd., 2005, p. 96).

¹⁷ In France, the law obliges terrestrial free-to-air channels to invest a minimum of 3.2 percent of net turnover on domestic films; for pay TV channels, this percentage rises to 20 percent. In Sweden or Finland, national channels also have to contribute to national film production. In Austria, broadcasters

contribute to a centrally administered film fund (David Graham and Assoc. Ltd., 2005, p. 96).

- ¹⁸ The remaining two quadrants in the model (David Graham and Assoc. Ltd., 2005, p. 98) are occupied by the Netherlands, Norway, Spain, and Sweden (flexible application of the TWF Directive but high additional requirements) and Greece and Luxembourg (prescriptive application but low additional requirements). To be able to verify the Czech Republic's position within this model, similar calculating measures used by the authors of the model would have to be applied; however, these were not given in the study.
- ¹⁹ These channels are TV Nova (established in 1994 as the first national commercial TV station in the post-communist countries; it is currently owned by the U.S.-based company Central European Media Enterprise, or CME), TV Prima (broadcasting since 1994, co-owned by the Swedish company MTG Broadcasting AB and Czech-based GES Media Europe) and two stations of the public service broadcaster Česká televize, ČT1 and ČT2. The market leader is TV Nova, with a 40 percent audience share, followed by ČT1 (23 percent), TV Prima (19 percent) and ČT2 (8 percent); the rest of the shares (10 percent) goes to cable and satellite stations (according to <http://www.ato.cz>, retrieved March 3, 2008).
- ²⁰ The reasons given for the non-compliance included "difficulty in finding European programmes" or in finding European programs at competitive prices, as well as the claim that the program offer is driven by audience demands for American over European films (Czech Council for Television and Radio Broadcasting 2006, p. 53).
- ²¹ According to interviews among national regulators (performed by David Graham and Assoc. Ltd., 2005, p. 93), only three of them stated that sanctions are applied "frequently," four said "sometimes" and four said "never." This complies with results from the survey among European broadcasters and regulators, showing that 59 percent of broadcasters and 79 percent of producers believe sanctions are never applied (David Graham and Assoc. Ltd., 2005, p. 93).
- ²² See <http://www.rrtv.cz/cz/dynamic/memo.aspx>, retrieved October 12, 2007.
- ²³ This information is based on the author's own secondary analysis of four full-month samples of program structure and audience ratings of the main Czech national TV stations (ČT1, Nova, Prima; primary data provided by ATO-Mediaresearch, s.r.o.). During these four months (March, June, September, and December 2006), TV Nova broadcast 217 internationally co-produced programs (programs involving one or more foreign country), 200 of which involved at least one non-European country (in 142 cases it was the United States). TV Prima broadcasted 59 co-productions, half of which involved a non-European country (the United States). ČT1 showed 90 co-produced programs altogether, 55 of which was "purely" European.
- ²⁴ The only non-domestic European program in the Top 100 on TV Prima was the blockbuster movie *Troy* (audience rating 9.6 percent), which, however, is a product of a British-U.S. American co-production.

- ²⁵ See also the EurodataTV project, for example, at: http://www.mediametrie.fr/webmail/eurodatatvnews06_01_20.htm; retrieved April 12, 2007.
- ²⁶ In a globalized television market, the question of origin of reality TV formats becomes increasingly obsolete; not just because the formats “purposefully eviscerate the national” to penetrate as many television markets as possible (Waisbord, 2004, p. 368), but also because they are themselves often transformed by numerous copies and spin-off versions, circulating around the globe.
- ²⁷ According to Schlesinger, “it is simply assumed that consuming the audiovisual (cultural) products—of whatever kind—has a powerful impact on the culture as a way of life” (Schlesinger, 1997, p. 372).
- ²⁸ The Member States had 24 months to adopt the provisions of the new directive into national law.
- ²⁹ Qtd. from http://ec.europa.eu/avpolicy/reg/tvwf/modernisation/proposal_2005/index_en.htm; retrieved November 9, 2007.
- ³⁰ Qtd. from <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/206&format=HTML&aged=0&language=EN&guiLanguage=en>; retrieved November 9, 2007.
- ³¹ According to the Commission, “the different degrees of regulation for broadcast versus on-demand content therefore reflect differences in user choice and control, and the likely impact on society” (quoted from http://ec.europa.eu/avpolicy/reg/tvwf/modernisation/proposal_2005/index_en.htm; retrieved November 9, 2007).
- ³² Viviane Reding, the European Commissioner for information society and media, expressed her concern for cultural diversity (and her confidence that the new Directive will help protect it) in several texts and speeches that were aimed at announcing the coming change in audiovisual media regulation (see Reding, 2005a; 2005b; 2005c).
- ³³ According to the Commission, “The result of these negotiations represents a positive outcome for cultural diversity in that the audiovisual sector now enjoys the same guarantees across the enlarged EU under the GATS (i.e. absence of market access and national treatment commitments), it is now clarified explicitly for the 25 Member States that the provision of content is excluded from the commitments on telecommunications services and safeguards are secured regarding the exclusion of audiovisual services enabled by computer and related services from the commitments in the computer services area” (European Commission, 2007d).
- ³⁴ In the Impact Assessment of the proposed AVMS Directive (European Commission, 2005e), the Commission explicitly stated, “The promotion of European works and works made by independent producers is held to be essential in order to contribute to cultural diversity within the EU, freedom of expression and pluralism. There is a general consensus not to change the rules relating to linear services.”
- ³⁵ Preparing the draft of the new Directive, the European Commission has made it clear that the possibility of applying some kind of quota policy to the

non-linear media environment has never been seriously considered. As the European Commissioner Viviane Reding stated in her speech at the 2005 conference in Liverpool, “The issue of what to do in the non-linear environment is more controversial. While we can, I believe, agree on the objective of a vibrant European audiovisual production sector reflecting the diversity of our cultures, it is clear that transmission time quotas such as those in Article 4—are not an option” (Reding, 2005a).

CHAPTER 7

Television: *The Stepmother?*

LILIA RAYCHEVA

7.1. Introduction

The virtual environment occupies a notable place in the interests of children. Studies show that they spend a substantial part of their time watching TV programs, surfing on the Internet, and chatting and texting on mobile phones. The products and services offered by the new information and communications technologies strongly compete with, and often challenge, family values and knowledge from school. Undoubtedly, information derived from these products and services affect children's intellect, psyche, and behavior. The virtual world is rich in positive and negative behavioristic models, which children, due to the peculiarities of their psychological development, transfer into the real environment too quickly. Their preferences for certain types of models change as they mature, and it is exactly during puberty that they become extremely vulnerable and their choices unpredictable. Quite often children see the audiovisual world and cyberspace as a shelter, where they feel free from everyday stress, fear, and loneliness. The TV set, the computer, or even the mobile phone display give them dialogue and social contacts that they are missing in the real world. However, the audiovisual world and cyberspace are not yet a safe shelter for minors. This brings to the fore the issue of positive and negative aspects offered by virtual reality: Does it broaden the mental outlook, or is it just an escape from an unfriendly social environment?

This text examines some current developments in the protection of minors from harmful and inappropriate TV content. The analysis concentrates on the regulatory challenges in line with the pan-European broadcasting media instruments. The paper also covers some of the regulatory practices of the Bulgarian Council for Electronic Media.

7.2. Television and violence

Television has widely been called the “third parent,” both because of its educational function and because TV programs often replace the physical presence of parents in the daily routine of the child.

Institutions, civil society, business, and the media have failed to coordinate in a purposeful and systematic way to protect children from dangerous content. Instead there have been only sporadic noisy campaigns (usually after a tragic or a provocative event) that only consolidate the position of the child as an object, a victim of circumstances, and not as a subject of society, enjoying full rights. Minors have no rights whatsoever either in the domain of media regulation, or in self-regulation or programming. They cannot choose their family, or their curricula, or the society they are living in. Instead, they must conform to the choices of their parents or guardians. The easiest and most promising way out of their victimization seems to be to adopt aggressive or asocial behavioral models. Contemporary audiovisual programming has been proven to promote such behavior.

The intensive development of audiovisual structures, and especially of television worldwide, has led to exponential growth in the number of channels, and sharp increases in the amount of air time, thus increasing the number of violent incidents witnessed on television. Videocentrism has almost abolished language barriers. A crime film or thriller, not to mention a porn film, could be made solely by editing the picture, sound, and specific effects. Speech simply elucidates the action a little and guides the viewer, who either turns into an investigator (as in the crime movies), or into a victim (as in the thrillers) of the screen narration. Tension builds up chiefly by means of viscosity and paraverbalism.

More than a decade ago, Bertrand Tavernier, incensed by the way in which television flagrantly violated people’s privacy, made his wonderful film *La mort en direct* (“Death Watch”). He showed how, in pursuit of sensation, a TV company implanted a mini-transmitter into a terminally ill cancer patient (Romy Schneider) to record her last days. Sidney Lumet’s *Network*, written by Paddy Chayefsky, posited another dramatic situation. Seeking desperately to boost his failing broadcast at the local TV station, its host announced that he would kill himself

in front of the cameras. (Two years before the film's release, a 29-year-old reporter in Florida actually shot herself on a live news broadcast.) For a couple of weeks, the ill-starred host, Howard Beale, grew from a miserable misfit into a sought-after prophet, and he boosted his show's ratings dramatically. However, when ratings once again declined, the producer of the show, governed exclusively by commercial interest, cold-bloodedly proposed to have the host shot in front of the cameras: "I think I can get the Mao Tse Tung people to kill Beale for us as one of their programs. In fact, it'll make a hell of kick-off show for the season. We're facing heavy opposition from the other networks on Wednesday nights, and the Mao Tse Tung Hour could use a sensational show for an opener. The whole thing would be done right on camera, in the studio. We ought to get a fantastic look-in audience with the assassination of Howard Beale as our opening show" (Chayefsky, P., 1976).

Death as commodity, violence as an instrument for advertising: This was the creative message of the two famous filmmakers. Television as a modern form of gladiator fights or bullfighting, with the inevitable bloodshed—this is the common thread of the two works. War, bloodshed, and violence are commodities in great demand—they are newsworthy, and so particularly promising for the journalistic reports. The question of ethical balance while reporting such events still remains open.

Of all media, television influences children the most, beginning at an early age. Although license requirements for children's and youth programming are not very stringent, broadcasters seem to have trouble meeting them. Child-related topics are unattractive for advertisers and, hence, for broadcasters. Additionally, daytime programs often offer content (including cruelty and violence) inappropriate for adolescents.

Although television is widely recognized as most influential of all media on children, there is no broad consensus on its effects on adolescents. A basic reason is that TV channels broadcast a variety of programs, some educational and inspiring, others cruel and depressing. There is an ongoing debate over the connection between exposure to violent TV content and the behavior of children.

Human aggressiveness is biologically determined. Freud's champions state that a man is instinctively aggressive and that each of us, whether introvert or extrovert, carries his or her share of

destructiveness. Behaviorists, in turn, claim that human aggressiveness is determined by one's way of life. They maintain that culture and harmonious social conventions, the ever-improving "socio," have a good chance of reducing harmful instincts.

Television violence is a particularly topical subject in media research. One controversy is prompted chiefly by the major dilemma: Could violence on the TV screen turn into a significant social threat, or is it an insignificant phenomenon artificially charged with alleged problems? In other words: Does violence shown on TV encourage aggression in younger viewers, or does it have no impact on their behavior? In a paper on media violence written for the Council of Europe, Guy Cumberbatch points out that over three-fourths of the existing studies claim that a direct connection exists between the crimes shown on TV and aggression in real life (Cumberbatch, 1995). Many scientists cite the 1982 publication of the National Institute of Mental Health in the United States (based on a ten-year investigation), which concludes that "violence on TV pushes the children and adolescents who watch these programs to aggressive behavior" (National Institute of Mental Health, 1982).

The researchers who support this allegation maintain that excessive watching of TV in general (not only of programs with violence) has a negative effect on the entire audience (Carlsson, 2006). Discord between children and parents, conflicts at school, and physical violence, according to them, are specifically related to excessive TV watching. Furthermore, the impact of screen brutality also depends on a number of factors, such as the organization of film editing and the dramaturgical escalation of action; the context of visual, verbal, and musical parameters of communication; the personal characteristics of the viewers; and the conditions under which the program is watched. Some scholars think that current TV entertainment programs often act as a specific guide to aggressive behavior for many children who would not otherwise act anti-socially (von Felitzen and Carlsson, 2004; Hattemer and Showers, 1995).

A number of studies have shown a direct correlation between the TV programs watched by primary-school children and the behavior of these children in adolescence. This correlation has proved stronger than the socioeconomic status of their parents, parent-children relations, the interrelations of children with their teachers and friends, or

how intelligent they are. Thus, a preference for violent TV programs at an early age may condition aggressive habits later on. If we fail to control our way of life, but have instruments for violence at our disposal, sooner or later these instruments will be used, after we have seen on the TV screen how easily this could be done (von Felitzen and Carlsson, 2004).

Another group of researchers dismiss as extreme the allegations that TV violence increases the aggressiveness of viewers in real life, as well as statements that television could replace parents in the upbringing of children. Neil Postman, for instance, is adamant that “violence shown on the TV has nothing to do with the increased aggressiveness in recipients” (Postman, 1993). The atrocities of the two world wars could not be linked to any TV impact, for television viewing did not become widespread until later.

Indeed, some studies have shown that the television can also have a positive influence on children, teaching them constructive social behavior. According to many authors, the major challenge in this situation is the lack of parental commitment. Accustomed to the “electronic nanny,” they somehow fail to teach their children early on how to change the channel or turn the set off (Siano, 1995).

In this situation two aspects of the “television and violence” theme can be approached: violence “on” television and violence “invoked by” television.

Violence on TV is approached by expert opinion along three lines, namely that the viewer can:

- be pushed to imitate the actions seen on the screen under suitable circumstances;
- be repulsed by on-screen violence and avoid resorting to violence in real life;
- become indifferent to, and accepting of, real-life violence.

7.3. Imitation

Teachers express concern that students today spend more time in front of the TV and computer screens than in the classroom. Thus they are exposed to a flood of violence: murders, robberies, arson, shootouts,

muggings, and torture. Children in primary school seem much more exposed to the impact of these scenes: In cartoons some kind of violence, however amusing, happens an average of once a minute. An unrepresentative study of about thirty Bulgarian third-graders and their attitude to animated cartoons proved interesting. Two-thirds of them preferred *Tom and Jerry*, with its ever-warring main characters, to the peaceful *Bananas in Pyjamas*. Moreover, almost all children seemed to like Jerry for his confidence, quick reaction, and aggressiveness. The inventiveness of the little mouse was never mentioned in the first place. The results of a similar study carried out in the United States of children's preferences for film fiction have shown their explicit interest in Arnold Schwarzenegger's *The Terminator*. However, both studies have one thing in common: The children studied did not demonstrate anti-social behavior (Raycheva, 1998).

Albert Bandura of Stanford University carried out laboratory experiments (with his famous Bobo doll) intended to establish to what degree schoolchildren tend to imitate audiovisual violence (Bandura, 1989). Unfortunately, "the culture of violence" has turned from a major physical and mental threat into a way of life in the upbringing of most of the younger generation. This has led some researchers to claim that television has become a school of violence and a university of crime. They even suggest that the instances of good prevailing over evil depicted on TV may teach the criminally minded how to avoid retribution in real-life situations.

The opponents of this thesis maintain in turn that violence on TV steps up aggressiveness only in those individuals who are predisposed to antisocial behavior. These researchers also de-emphasize television's role in developing such a predisposition (Angelov, 2005).

7.4. Repulsion

Another approach to the issue holds that TV violence may repel one from resorting to aggressiveness in life. One widespread idea is that aggression in children shows their independence. As the children are well aware how limited their power is by parents and teachers, they hail TV screen violence as a way to shake off this complex of powerlessness and to watch the manifestation of TV power undisturbed. For instance the

study of Bulgarian third-graders cited above found that their interest in the function of the guillotine was aroused by the popular TV show *Kanaleta*, which depicted this contraption when it “cut away” for a commercial break.

Some researchers assert that the long hours spent in front of the TV screen help reduce aggressiveness in everyday life. They cite the TV interpretation of rock and pop music as an example of free expression of social and aggressive energy. Evolving as a specific revolt of teenagers in the mid-1950s, this type of music has long occupied a place on the TV screen, aiding—as a number of papers conjecture—a catharsis therapy for young people in grappling with the problems of their age group (Kunczik, M. 1993; Rockwell, J. 1979).

7.5. Indifference

The third group of studies stresses that an overdose of TV violence may leave the viewer indifferent to crime around him in the real world. They allege that people more intensively exposed to the media, and especially to television, generally develop a suspicion of reality. On many TV programs, characters are habitually surrounded by violence. Furthermore, apocalyptic footage is shown daily on news and documentary broadcasts. According to these researchers, intensive TV watching inculcates fear and mistrust of reality. The viewer gets used to the feeling that at any moment he may become a victim of some type of violence, and his intolerance of aggression in real life is dulled (Lopiparo, J. 1977).

Also, more than a quarter of a century ago, George Gerbner pointed out that television’s major impact lies in its ability to transmit not so much information as ideas of social structures, norms, and behavior. Overexposure to violence on the TV screen may convey to viewers the idea that we live in a hostile world that is out of our control (Gerbner et al., 1980).

Another important aspect of the issue concerns violence “invoked by” television. The viewers live on the boundary of two realities: the actual one and the one created by the mass media. The outlines of these two realities get progressively fuzzier: Real life acquires illusory dimensions, while the TV world takes on virtual parameters.

A deeper probing will show that this diffusion is so great that our real world has started to resemble the TV reality. Let us take, for instance, the assassination of Andrei Loukanov, Bulgarian politician and former prime minister, in front of his home on October 2, 1996. Was it not performed and even presented by the media as a crime? Even the hackneyed phrase uttered repeatedly by the mass media (including on television) that after the assassination “Bulgaria shall not be the same” seemed borrowed from the vulgar novel (as its author, Hristo Kalchev, has himself defined it) *Caligula the Raving*: “The Raving was dead and [...] all big shots or pygmies in this State would have to abide by this fact or at least allow for it. Zhorzh Izov the Raving [...] had lived in such a way that after him ‘nothing in Bulgaria could ever remain the same.’ Much easier or with less commotion the country would have survived the death of its President, of the Speaker of Parliament, of the Prime Minister...” (Kalchev, 1996).

The day of Andrei Loukanov’s assassination witnessed another grave crime, this one on the motorway near Veliko Turnovo: A bus was attacked and robbed. Damages amounted to U.S. \$57,000, and one of the passengers was shot and wounded. However, this news failed to make the TV news broadcasts (according to the Press Center of the Ministry of Internal Affairs). This comparison of the two big crimes is not to belittle the place of Andrei Loukanov in the political landscape of Bulgaria but only to show how the television adapts to the “corrida rules.” The assassination at 15 Latinka Street (the home of Andrei Loukanov) was a more compelling incident—it was fatal, blood was shed, the victim was very well known, viewers were shocked, and the footage became headline news and even made the world newscasts.

Practice shows that flagrant examples of violence flow from the screen: from the selection of news items in the news broadcasts to their arrangement in the program; from the choice of a viewpoint in the talk shows to preferences of whom to interview on specific topics; from the interruption of broadcasts by advertisements to the contents of these same advertisements. It is an open secret that TV advertisements are designed not to advertise the properties of goods or services, but to exacerbate the complexes of the viewers.

7.6. European policies on the protection of minors

Protection of the best interests of the child holds priority in the UN Convention on the Rights of the Child (UN Convention, 1989). It has since been ratified by all governments except the richest, the United States, and one of the poorest, Somalia. According to Article 17 of the Convention, “States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.” In the media context, among other issues, the Convention also states that:

- the child shall have a right to expression in any medium of his or her choice;
- the child shall have access to information and materials from diverse national and international sources;
- along with this, the child must be protected from informational and material harm.

The European Community has consistently paid thorough attention to the protection of children in various areas. The Green Paper on the protection of minors and human dignity in audiovisual and information services marked the beginning of a debate, at a pan-European level, on the ethical parameters of the information society and audiovisual services provided by the new information and communication technologies. In contemporary times the linear TV programs are challenged by new hybrid audiovisual forms, bringing together games, advertising, or information. The editorial model with the increased personal choice for selection from a wide range of TV programs shifts towards the individual communication model in the online services. The implementation of measures to protect minors requires new solutions for material labeling through increased parental control, both in television and in online environments, using new digital methods (personal codes, filtering software, or control chips). The encouragement of cooperation between the interested parties, such as government, industry, public authorities,

service and access providers, and consumers is important for the Member States in the process of establishing, implementing, and evaluating national measures in the area of regulation, self-regulation, and public awareness of the audiovisual services concerning protection of minors (European Commission, 1996). The Council Recommendation of 1998 (98/560/EC) on the protection of minors and human dignity was the first important instrument relating to the regulation and self-regulation of the content of audiovisual services and online information that follows on from the 1996 Green Paper. It aims at providing guidelines for national legislation in this area (European Council, 1998).

On December 20, 2006, the European Parliament and the Council adopted a Recommendation on the Protection of Minors and Human Dignity and on the Right of Reply in relation to the competitiveness of the European audiovisual and online information services industry (2006/952/EC). The Recommendation extends the scope of the earlier Council Recommendation (1998) to include media literacy, co-operation, and sharing of experience and good practices between self-, co- and regulatory bodies, action against discrimination in all media, and the right of reply concerning online media (European Parliament and the Council, 2006b).

These texts are supplemented by the Recommendations of the Parliamentary Assembly and the Committee of Ministers of the Council of Europe relating to the protection of minors and adolescents from any harmful content of the electronic media. These are not legally binding documents, but they represent important standard-setting issues.

The main international instruments in the field of TV broadcasting dealing with the protection of minors and adolescents are:

- The European Convention on Transfrontier Television (now under revision);
- The Audiovisual Media Service Directive.

Both sets of regulations stipulate mainly that parties to the agreements should protect minors against exposure to pornography or gratuitous violence.

The aim of the European Convention on Transfrontier Television since its entry into force on May 1, 1993, has been to facilitate, among the parties (currently thirty-two), the transfrontier transmission

Table 7.1. Recommendations of the Council of Europe on protecting minors

Recommendation	Subject
Recommendation 963 (1983) of PACE	on cultural and educational means of reducing violence
Recommendation 1276 (1995) of PACE	on the power of the visual image
Recommendation 1165 (1998) of PACE	on the right to privacy
Recommendation 1466 (2000) of PACE	on media education
Recommendation No. R (89) 7	on the principles of distribution of videoprograms having a violent, brutal or pornographic content and its Explanatory Memorandum
Recommendation No. R (90) 10	on cinema for children and adolescents
Recommendation No. R (92) 19	on video games with a racist content
Recommendation No. R (97) 19	on the portrayal of violence in the electronic media and its Explanatory memorandum
Recommendation No. R (97) 20	on “hate speech” and its Explanatory Memorandum
Recommendation No. R (97) 21	on the media and the promotion of a culture of tolerance and its Explanatory Memorandum
Recommendation Rec (2001) 8	on self-regulation concerning cyber content (self-regulation and user protection against illegal or harmful content on new communications and information services)
Recommendation (adopted by the Standing Committee on Transfrontier Television at its 37th meeting on 11-12 October 2004)	on the protection of minors from pornographic programs
Recommendation (2006) 12 E	on empowering children in the new information and communications environment
Recommendation CM/Rec (2007)11	on promoting freedom of expression and information in the new information and communications environment

Source: Council of Europe. Adopted texts.
(http://www.coe.int/t/cm/Home_en.asp; retrieved April 12, 2008)

and retransmission of television program services. It is a legally binding document that lays down a set of minimum rules in areas such as the responsibility of broadcasters in regard to programming matters, including the European content of programming; advertising; teleshopping; and sponsorship, as well as the protection of certain individual rights (Council of Europe, 1989).

Particularly important is the “Good Morals” category or, in other words, public morals. Article 7 (1) of the *ECTT* dealing with the responsibilities of the broadcaster states:

“All items of programme services, as concerns their presentation and content, shall respect the dignity of the human being and the fundamental rights of others. In particular, they shall not be indecent and contain pornography; give undue prominence to violence, or be likely to incite racial hatred.”

For this reason, the protection modes intended for underage viewers are restricted to the hours when the programs are broadcast and viewed. Thus, whenever there are programs with unsuitable content on the air, age limits for the child audience are explicitly fixed. The norm of Article 7 (2) of the *ECTT* adds that “All items of programme services which are likely to impair the physical, mental or moral development of children and adolescents shall not be scheduled.”

The provisions of the Convention on the Protection of Minors and Adolescents also extend to advertising and teleshopping, setting the general standards in Article 11 (3): “Advertising and teleshopping addressed to or using children shall avoid anything likely to harm their interests and shall have regard to their special susceptibilities” and (4): “Teleshopping shall not extort minors to contract for the sale or rental of goods and services.”

The *ECTT* and its amending Protocol have similar objectives as the Audiovisual Media Service Directive, although the intention of the *AVMS* Directive as an instrument of the European Commission is to create a common market in broadcasting.

The need to set some minimum standards applicable in all Member States to regulate the rigorously developing TV and radio market, following the rapid technological developments in the 1980s resulted in the European Union adopting the Television without Frontiers Directive 89/552/EEC on October 3, 1989. This Directive constitutes the legal EU framework aimed in particular at preserving certain objectives of public

interest, such as cultural diversity, the right to reply, protection of consumers, and protection of minors. The general principle of the TVWF Directive is that Member States must ensure freedom of reception and that they may not restrict retransmission of television programs from other Member States on their territory, unless they infringe the Directive's provisions on the protection of minors (European Council, 1989).

The intense developments in the audiovisual sector determined the need for further extensions of the rules regarding some of its general provisions. The convergence of technologies caused the interweaving of linear and non-linear services. Expansion of the fixed broadband, digital TV and 3G networks rapidly changed the viewers' habits. The vertical structure of audio-visual programming has been gradually displaced by horizontal fragmentation of the audiences, who wish to schedule their viewing at their convenience. Technological progress has had a powerful impact on the business models of media industry. A need for modernization and adjustment of the regulatory framework has crystallized in this new situation of rigorous market and technology developments.

After a lengthy and intensive discussion, more coherent measures for reinforcing the pan-European audiovisual policy were proposed to the Community legislator, taking into account the objective of creating a pro-competition, technologically driven and growth-oriented environment for the development of the audiovisual sector. A broad consensus on the scope, European works, co- and self-regulation, and independence of the national media regulators has been achieved. Thus the amending Directive was adopted on December 11, 2007, and entered into force on December 19, 2007. Member States had two years to transpose the new provisions into national law, so the modernized legal framework for audiovisual media services has been fully applicable throughout the European Union by the end of 2009.

The AVMS Directive offers a comprehensive legal framework that covers all linear (broadcasting) and non-linear (on-demand) audiovisual media services, provides less detailed and more flexible regulation, and modernizes rules on TV advertising to better finance audiovisual content. The AVMS Directive also upholds the basic pillars of Europe's audiovisual model, such as cultural diversity, media pluralism, and protection of minors, consumer protection, and intolerance of incitement to racial and religious hatred. It acknowledges that "audiovisual media services are as much cultural services as they are economic

services.” In particular, the new Directive underlines the importance of promoting media literacy, the development of which can help people “exercise informed choices, understand the nature of content and services and take advantage of the full range of opportunities offered by new communication technologies” (European Parliament and the Council, 2007). Thus they will be better able to protect themselves and their families from harmful or offensive material.

The Directive also stresses that “measures taken to protect minors and human dignity must be carefully balanced with the fundamental right to freedom of expression as laid down in the Charter on Fundamental Rights of the European Union. The aim of these measures, such as PIN codes (personal identification numbers) or labelling, should however be to ensure an adequate level of protection of minors and human dignity, especially with regard to non-linear services.”

A special provision concerning the influences of commercial communication on children is included in Article 3e of Chapter IIA: Provisions Applicable to All Audiovisual Media Services.¹

A separate chapter in the AVMS Directive is dedicated to the protection of minors in television broadcasting (Chapter V). In particular, Article 22 states that:

“1. Member States shall take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction do not include any programmes which might seriously impair the physical, mental and moral development of minors, in particular programmes that involve pornography or gratuitous violence. (...)

“3. Furthermore, when such programmes are broadcast in unencoded form Member States shall ensure that they are preceded by an acoustic warning or are identified by the presence of a visual symbol throughout their duration.”

The scope both of the ECTT and the AVMS Directive is very flexible and dynamic. That is why improving them is an ongoing process. In particular, the revision of both instruments by the participating Parties concern:

- their scope (the broadening of the traditional television broadcasting towards the ICT audio-visual services);

- their duties;
- the broadening of the jurisdiction and the scope of the regulatory practices, involving co-regulation and self-regulation;
- the freedoms of reception and retransmission, including intended and unintended transfrontier distribution;
- the developments of advertising techniques (advertising, sponsorship, teleshopping, product placement, etc.);
- the protection of rights granted by the ECTT and the AVMS Directive (such as the right to information and cultural objectives, media pluralism, right to reply, protection of minors and respect for human dignity), etc.

The rapid change of the audiovisual market requires thorough refining of the existing norms in the Convention and the Directive, supported by a broad consensus. The challenge is whether the regulatory changes should anticipate or follow the media practices.

7.7. TV regulatory practices of EPRA

The need for still-closer cooperation between the regulatory bodies of the different countries in implementing the European media policies was determined by the ever-faster developing processes of transfrontier globalization and convergence. The European Platform of Regulatory Authorities, set up in 1995, provides a forum twice a year for the regulatory authorities—members of the Platform. It encourages the exchange of information on common issues of national and European broadcasting regulation, as well as informal discussions of practical solutions to legal problems regarding the interpretation and application of broadcasting regulation. The European Commission and the Council of Europe are standing observers of the Platform, in which fifty-one regulatory authorities from forty-two countries in Europe are holding membership (EPRA, 2008).

The issue of the protection of minors has often been discussed at EPRA meetings. The issue of violence on television was first raised at the 7th EPRA meeting in Fredrikstad, Norway, in 1998. It was pointed out then that “from a regulatory point of view, the difficulty is to keep a balance between the right to free information, as stated in Article

Table 7. 2. EPRA meetings connected with the issues of protecting minors

Year	Place of meeting	Topic
1998	7th meeting in Fredrikstad, Norway	Violence on TV
1999	9th meeting in Vevey, Switzerland	Sex on Screen, the Parameters of Permissible
2001	14th meeting in Malta	Working group on the protection of minors
2003	main plenary session at the 17th EPRA meeting in Naples, Italy	Self-regulation of TV-content with respect to protection of minors and violence
2003	18th meeting in Nicosia, Cyprus	The rating systems
2004	19th meeting in Stockholm, Sweden	Practical examples of cases and current issues of concern

Source: European Platform of Regulatory Authorities.
(<http://www.epra.org/content/english/index2.html>)

10 of the European Convention on Human Rights and the protection of the audience against harmful programme content” (EPRA, 1998). This meeting revealed that, parallel with the many contradictory interpretations, ranging from the assumption of a positive cathartic effect to a direct correlation between violence on screen and violent behavior in real life, national approaches to the question of violence on television are extremely varied (EPRA, 1998).

In his presentation at the 14th EPRA meeting in St. Julians, Malta, Alecos Evangelou, the then-chairman of the Cyprus Radio-Television Authority, pointed out that “compared to adults, children have different thinking abilities and less experience to help them construct a meaning of the television messages they receive. In addition, children of different ages have different information-processing abilities to the television-viewing situation. This disparity in thinking and information-processing abilities is what makes children a special group of viewers” (EPRA, 2001). It was agreed that the obligation of regulators is to protect children and young adults, first, from information which they are unable to process and perceive because of their age and, second, from information to which they should not be exposed at such an age (EPRA, 2001).

The plenary session of the 17th EPRA meeting in Naples dealt with the issue of self-regulation of TV content with respect to the protection of minors and violence. In his presentation, Sven Egil Omdal, a media practitioner for more than thirty years, a former member of the Norwegian Broadcasting Complaints Commission, and former President of the Press Council, expressed confidence that self-regulation was a far better system—providing that the media itself was determined to make it work. Discussing the practices of the Norwegian Press Council, established in 1928, he said it was highly respected both within the media and among the public.

“As convergence picks up speed, and more and more people receive newspaper articles, radio programmes or television productions through broadband Internet connections, the old divisions between the regulatory systems for the different media become more and more unpractical and will eventually be regarded as obsolete. The Norwegian Press Council treats complaints against all media, regardless of publishing platform. The code of conduct upon which it bases its decisions has been amended to include online and wireless media. That, and the fact that there is only one regulatory body for all media, ensures that all journalists and media workers are judged by the same standard” (Omdal, 2003).

The Norwegian law respects the 9 p.m. limit concerning material that might be harmful to minors. The Norwegian Ombudsman for Children has proposed to expand the Code of Conduct to include news and current affairs within this watershed regulation. According to the Code of Conduct, media are obliged to protect minors in conflicts between their parents; as a general rule, it is prohibited to identify minors directly or indirectly in stories about family conflicts. The Press Council is, however, not authorized to censure anyone for breaking the regulation, even if it might be argued that this is an ethical question rather than a technical one. The Norwegian model is based on the self-discipline of the media practitioners, which again is based on the ability of editors, publishers, and journalists to cooperate (Omdal, 2003).

At this EPRA meeting, co-regulation practices have also been discussed as those of the Swedish Press Council and the institution of the Swedish Press Ombudsman, being heteronomous self-regulatory

bodies, based on contracts with the legal society and the Parliament, and Granskningsnämnden, the Broadcasting Commission, which is a government body.

The practices of self- and co-regulation were further tackled in the background information paper on the practices of the regulators in France, Netherlands, and Germany. They were selected on the basis of their distinctiveness and because they all included, albeit at various degrees, elements of self- or co-regulation.

The IRIS Special, a publication of the European Audiovisual Observatory, dedicated to the topic “Co-Regulation of the Media in Europe,” makes a terminological distinction between self-regulation, self-monitoring, co-regulation, and regulation (Palzer, 2003):

- *Self-regulation* implies a regulatory framework under which bodies draw up their own regulations in order to achieve certain objectives and take full responsibility for monitoring compliance with those regulations. A key element is the voluntary participation of those subjects to regulation. Public authority sanctions cannot be imposed but only those provided by civil law.
- *Self-monitoring* is limited to monitoring compliance with a given set of regulations that have been laid down by another authority.
- *Co-regulation* covers various co-operative forms of regulation designed to achieve public authority objectives. It contains elements of self-regulation as well as traditional public authority regulation. It is based on a self-regulatory framework. However, it is still incumbent on the public authorities to monitor the activities of the self-regulatory body and intervene, if necessary.

Almost two decades ago, the French Conseil Supérieur de l’Audiovisuel (CSA) issued a directive that broadcasters should not broadcast any violent or erotic programs between 6 a.m. and 10 p.m. The principle of *signalétique*, adopted in 1996, aimed to establish a correlation between the system of television program rating symbols (pictograms) and scheduling in cooperation between the CSA and broadcasters. The system applies to all broadcast services, whether free-to-air or not. The *signalétique* is used for all kinds of programs (cinema or TV fiction, serials, cartoons, and documentaries) except the news, but essentially for fiction. The pictograms are also to be found in TV schedules and trailers (CSA, 1996).²

A rating system close to the CSA practice is the Dutch Kijkwijzer, introduced in 2001 by the NICAM (the Netherlands Institute for the Classification of Audiovisual Media). Participants in NICAM include public and private broadcasters as well as film distributors, cinema operators, distributors of films on video and DVD and of computer games, videotheques, and retailers. What distinguishes this system from others is that it introduces a uniform classification system for film, TV, video, DVD and games and that it includes clear self-regulatory components. The system is based on a classification by age (all ages, not for children under six, twelve, or sixteen years of age) and relevant content categories (violence, sex, fear, discrimination, drug and alcohol abuse, and swearing) developed by Dutch academics. Through pictograms, the system shows what the potential problems of a product are for a particular age category (NICAM, 2001).³

In Germany, according to legislation on the protection of minors that entered into force in 2003, a uniform regulatory system for all electronic media (broadcasting and Internet), stricter rules concerning the protection of minors and more elements of self-regulation have been introduced through the Federal Act on the Protection of Minors (Jugendschutzgesetz) and the Interstate Treaty on the Protection of Minors in the Media (Jugendmedienschutz-Staatsvertrag, JM-StV). The new Treaty brought new media supervisory structures and a new distribution of competences between the Federal Government, which is now responsible for “offline” media, and the Länder (German states), which are responsible for all online media. Both media services and teleservices have been redefined as “telemedia.” Central to the new supervisory structures are the Commission for the Protection of Minors in the Media (Kommission für Jugendmedienschutz, KJM) and the voluntary self-regulation organizations (Selbstkontrollenrichtungen, SKEs) that it certifies (Pertzinidou and Machet, 2003). Similar rating systems have been adopted by the regulators elsewhere in Europe, such as Bulgaria, Poland, Greece, Slovakia, and the French Community of Belgium.

Current issues of concern, along with examples from different countries, and the issue of the protection of minors in news and current affairs programs were discussed at the 19th EPRA meeting in Stockholm. The Romanian regulator shared experiences with offenses in which minors are considered an audience, as well as a topic of the

programs. Germany gave examples of “extreme” game shows such as *I’m a Celebrity, Get Me out of Here!* (RTL), *Schuermann’s Gebot* (Neun Live), *Fear Factor* (RTL), or *Scare Tactics* (MTV). These programs appear to test social norms and break taboos in the hope of attracting public interest and thus generating greater audiences. France focused on the erroneous age classification of a fiction program *La ligne Noire* and the U.S. TV series *24 Hours*, the promotion of dangerous behavior in programs like *Fear Factor*, and the trivialization of sex and pornography during daytime programs *Thé ou café* and *Les co-locataires* (EPRA, 2004).

7.8. The case of Bulgaria: children

Bulgaria’s accession to the European Union has not resolved some important social challenges of the post-communist era, especially concerning real incomes, health care, education, and child care. There is a steady decline in the number of children and an increase in the number of retired people, who already outnumber the adolescents two to one. More than 70 percent of the households in the country have no children under 16.⁴ In these indices Bulgaria equals and even outstrips the most advanced European countries.

In spite of Bulgaria’s traditions in education, the negative natural growth of the population and the low standard of living have reduced the number of students in the schools. Another alarming trend is the growing number of children who do not attend school (of about 1 million students, 40,000 have dropped out of school, and about 30,000 have never attended it), as well as the lack of communication between school authorities and parents. The endless reforms and rule changes further reduce children’s trust in the education system.⁵

Family foundations are also faltering. The number of children without parents is increasing. About 21 percent of all minors in Bulgaria are raised in one-parent families. Patriarchal family relations still dominate in Bulgaria, in which children are regarded by adults as objects, rather than as equal subjects.

The use of alcohol and narcotics, cases of HIV/AIDS and sexually transmitted diseases, early pregnancies, and abortions are increasing in frequency among adolescents. There is a discouraging pattern

of juvenile delinquency, as well as of children suffering from violence (rape, incitement for soliciting and begging, maltreatment in the family, pornography, etc.).

The social problems of the post-communist Bulgarian society seem to reflect a crisis of values. This gives rise to serious problems in children's social behavior. Quite unnoticed, a whole generation has grown up with gravely impaired status and rights. Apparently, the society has failed to ensure a safe environment that would encourage the development of children.

All these problems are only sporadically discussed in the media. Children's programs and programs on children's issues are not welcome on TV. Commercial TV currently excludes these societal problems from its daily schedule, most of which consists of content inappropriate for children.

7.9. Legislative framework

Legislation on the protection of children is well-developed in Bulgaria, especially compared with international and European legal obligations. In 1991 Bulgaria ratified the UN Convention of the Rights of the Child. In 2000 the Child Protection Act was adopted. In Article 11 of the Act, a general framework on child protection against violence, presumably originating from the media, was introduced by Bulgarian legislation.⁶ Bulgarian law criminalizes certain acts that are recognized as socially dangerous for minors. These acts are specified in Article 159 of the Penal Code.⁷ The provision concerning the creation, publication in any form, and dissemination of pornographic material applies to all types of media (print media, radio, television, information agencies, the Internet). This text is in conformity with the constitutional norm of Article 40 (2) of the Bulgarian Constitution.⁸ Pursuant to Article 37 (4) of the Film Industry Act, the National Film Classification Committee at the Agency classifies films in rating categories.⁹

A number of programs oversee children's welfare, including the National Strategy for Child Protection (2004–2006); a Strategy for a National Youth Policy in the Period 2003–2007; an Integrated National Plan for the Implementation of the UN Convention on the Rights of the Child (2006–2009); a National Program for the Development

of School Education and Preschool Instruction and Training (2007–2015), a number of inter-institutional programs, and programs and initiatives of the non-government sector.

The Radio and Television Act¹⁰ also contains texts on the protection of children. Thus, for instance, under the provisions of Article 17, subpara. 2 of RTA, “the radio and TV operators must refrain from the creation or distribution of broadcasts in violation of the principles under Article 10, as well as of broadcasts inciting national, political, ethnic, religious, or racial intolerance, extolling or justifying cruelty or violence, or aimed at impairing the physical, mental or moral development of the minors and adolescents.” The mechanisms designed to protect infants and minors provide for a specific measure—the introduction of restrictions by time of day, indicating that the broadcasting in any form of programs that may impair the development of children is prohibited within a specified time period (between 6 a.m. and 11 p.m.). Article 76 of RTA normatively provides special requirements for the advertisements broadcast by the radio and TV operators and addressing the minors.

Within the framework of self-regulation, the adopted ethical rules obligate radio and TV operators to pay particular professional attention in their work to the needs of the child audience (Code of Ethics, 2004). Regarding the protection of minors, it specifically stipulates that radio and TV operators must demonstrate special responsibility in respecting the rights of children (2.4.1) and take no advantage of children’s innocence and trust (2.4.2).¹¹

In 2005, the Foundation National Council for Journalistic Ethics was registered. Its main aim was to establish a system for self-regulation of the media by implementing the Code of Ethics and resolving arguments between the media outlets and the audience. Co-founders of the foundation were the Association of the Bulgarian Radio and Television Operators ABRO, the Union of Publishers in Bulgaria, the Union of Bulgarian Journalists, the Bulgarian Media Coalition, and the foundation Media Development Center. The foundation has two standing bodies—an Ethics Commission in the Print Media Sector and an Ethics Commission in the Electronic Media Sector, which deal with complaints lodged against infringement of the Ethics Code.

The major functions of the Ethics Commissions are to oversee whether the Code of Ethics adopted by the Bulgarian print and

electronic media outlets is complied with, to resolve arguments between the media outlets and the audience, to encourage public debate on issues of journalistic ethics, and to contribute to the establishment of professional and journalistic standards and thus safeguard the freedom of speech and the communication rights and freedoms of the Bulgarian citizens vested in the Constitution of the Republic of Bulgaria (National Council for Journalism Ethics, 2004).¹²

After two years in operation, however, the Ethics Commission in the Electronic Media Sector did not register a single result in protecting minors from harmful content, although TV programming practices demonstrated a number of violations against the Code of Ethics.

7.10. Television and children

Bulgarian children spend an average of three hours a day watching television. Usually this happens at home, and since few families can afford a second TV set, children watch the family's TV. This, however, does not mean that a parent or an elderly family member always controls what the child watches. Due to their parents' work schedule, children spend much of the day at home alone, with freedom to watch whatever they wish, regardless of its effect on them. Parental programming controls to automatically block TV programs with inappropriate content are not yet widespread in Bulgaria, and the culture of preventing children from harmful TV influence is still at an embryonic stage. In this sense, it is still an issue what exactly children prefer to watch and whether existing TV programs guarantee the protection of their interests.

The liberalization of the Bulgarian audiovisual market gives the children who live in a household with cable TV (their total number is 1,088,805, or less than half of the households in the country) the chance to watch, in addition to the three national terrestrial programs (BNT, bTV, and Nova Televizia), a variety of foreign satellite and Bulgarian cable television programs. At present, Bulgaria has a total of 372 natively created program services (150 radio and 222 TV).¹³ The problem, however, is whether this supply guarantees a wide choice. It does not, because the variety of genres is reduced to a minimum, which can hardly satisfy the cultural, aesthetic, and

informational needs of the audience. Once again, the typical paradox of contemporary society is observed: quantitative supply, reduced quality, lack of variety, and limited choice. In the context of TV productions for children, such a mixed situation indicates at least two disturbing tendencies: reduction of the child audience's possibilities for educational and personal development through television, and the children's transformation into consumers. The problem gets worse when it comes to children with intellectual, mental, and physical impairments. They are not included in any audience framework, and no TV station produces programs designed to satisfy their specific needs. The quality of children's TV productions is also a topical issue (Raycheva, 2006).

Currently, Bulgarian television stations as a whole approach the children's audience mainly in terms of entertainment. The insufficient production of educational programs in Bulgaria raises the issue of extreme commercialization of the TV landscape. Television programs include much fewer cognitive and educational issues. A notable exception is the satellite educational television ESET, launched in 2003. However, its distribution nationally by cable operators is still insufficient.

In the absence of high-quality, age-appropriate content, plus insufficient control within the family, children are subjected to cheap, sensationalist film productions full of sexual content and violence, which account for most of the movie offerings on Bulgarian television, especially on cable. Someone under eighteen, who is in the process of building up his or her personal identity, is more suggestible and susceptible to these screen risks. Children have a higher psychological vulnerability, higher credulousness, and higher curiosity; they are also more active consumers of audiovisual media.

Additionally, TV broadcasters remain in violation of existing requirements. Broadcasters do not offer effective protection of children from inappropriate content; nor do they honor children's right to watch programs designed for them, thus stimulating their development and encouraging their talents. All this, combined with the uncoordinated actions of the institutions, the civil sector, and the media in Bulgaria confirms the child's position as a victim of circumstances, not as a member of society who enjoys equal rights of choice and protected interests.

7.11. The practices of the Council for Electronic Media

The Council for Electronic Media is an independent and specialized body that enforces the Radio and Television Act, while at the same time protecting and extending free speech, the free flow of information, and the independence of radio and television operators in Bulgaria.

Guided by its obligation to protect minors from inappropriate media content, the Council regularly holds discussions with the non-governmental sector and the professional organizations of the radio and TV broadcasters. However, since 2001 the regulator has imposed only twelve out of a total of 359 property sanctions on broadcasters for infringing Article 76 of RTA (advertisements violating the generally accepted moral norms); Article 17, subpara. 2 of RTA (broadcasts aimed at impairing the physical, mental, and moral development of minors); and the principles under Article 10, subpara. 1, point 6 of RTA relating to the “good morals” category.

A successful blow against the disturbing prevalence of cheap transatlantic programs with content inappropriate for children was triggered in 2002. The Parents’ Association objected to the largest private TV broadcaster—bTV—broadcasting the wrestling shows *Raw Force* and *Smack Down* during daytime hours. The Council for Electronic Media organized public discussion. It then adopted a decision that broadcasting WWF matches containing violence before 11 p.m. contravened the law. It ordered the Balkan News Corporation to comply with the requirements of its licence and terminate those broadcasts before 11 p.m. The CEM based its decision on the grounds that the broadcasts “affect adversely the psyche and behavior of children and teenagers, and have led to a drastic increase in traumas and injuries as a result of imitation of the fights between WWF wrestlers shown on bTV.” The regulatory authority’s decision was appealed by the private television broadcaster on the grounds of censorship of broadcasting. The Supreme Administrative Court (SAC) found that the CEM decision was a “precautionary coercive administrative measure intended to protect the physical, mental and moral development of infants and minors.” As a result the shows were withdrawn from the daytime schedule.

Another case is related to obscene chat postings featured in a video clip broadcast by MM, a music channel. The Sofia Regional Court

upheld the penalty decree issued by the chairperson of CEM, pointing out that broadcasting the video clip constituted an administrative violation of Article 17 (1) of the RTA. The court held that children and adolescents “are more vulnerable, their worldview is still unstable, their value system is in the process of formation, and the protection of their health, mental and psychical development, as well as the creation of normal conditions for their moral development is in the interest of the whole society and the State. In this sense, broadcasting obscene and indecent expressions in a broadcast addressed to infants and minors contravenes the principles of upbringing of adolescents and of the formation of a correct worldview, moral principles and value system. This is so because children and adolescents are most susceptible to the negative effects of the uncontrolled dissemination of information and they usually cannot make a free and informed choice of radio or television programme services.” In a judgment dated April 8, 2003, the Sofia City Court upheld the Sofia Regional Court’s act, agreeing with its conclusions that “the television broadcaster had the technical possibility to restrict and even to cut the broadcast postings without interrupting the programme service or the broadcast video clip.”

The Council for Electronic Media steadfastly supports co-regulation. Following the concerted efforts of the three broadcasting televisions with national coverage, CEM adopted a decision by which it recommends to the operators to prepare and introduce a unified marking system on the principle of “controlled access.”¹⁴ This is one of the major achievements in the process of media co-regulation. Given the increasing distribution of videos containing profanity and vulgar gestures, CEM adopted a special Statement on the Need in Protection of Minors and Adolescents during Broadcasting of Songs in the Radio and TV Programs.¹⁵

The CEM adopted also several documents of a preventive nature: a Declaration on the Increasing Cases of Alcohol Poisoning among Minors; a Declaration on the Big Brother Program; and a Freedom of the Speech Charter in the Republic of Bulgaria (2004). Since the international acts and national legislation lack a juridical definition of the “good morals” concept, in 2005 the Council for Electronic Media, in partnership with the UNICEF National Office in Bulgaria, organized a round table in which numerous aspects of the protection of minors and adolescents from the adverse effects of some radio and TV programs

were discussed. Following the discussion, CEM voted a standpoint on the application of the “good morals” concept to protect minors. However, this standpoint was not appreciated by the broadcasters, and the media and CEM had to withdraw it.¹⁶

To summarize: Despite Bulgaria’s adoption of quite complex legislative standards, the country’s children are still not effectively protected from harmful media content. According to the RTA, “radio and TV operators shall be held responsible for the content of the programmes they offer for distribution.”¹⁷ But within the framework of self-regulation, they do not yet apply professional standards effectively when covering scenes of violence and cruelty. Deficiencies in the protection of children’s interests by the mass media generally show through in the lack of technical means for program filtering, programs for children with special needs, programs for at-risk children, access of the children to the media, quality children’s programs, and media pedagogy. It will depend on the adults’ efforts what our children’s Third Parent will offer: teaching the positive, or avoiding the negative.

That is why CEM is outlining the parameters of a wide-ranging national program intended to address the impact of television on adolescents in a dynamically developing media environment. For the television, this could be achieved at several levels:

- in the domain of regulation: by adding to the RTA clearly formulated texts demanding from the operators action directed at protecting children from unsuitable content, and setting up fixed volumes (in line with the program profile of the operator) for the distribution of children’s, youth, and educational programs;
- in the domain of self-regulation: by achieving a broad consensus among all TV operators on the introduction of a unified system for marking programs with unsuitable content for children and of mechanisms for its application;
- in the domain of programming: by paying special attention to the production and distribution of quality children’s and educational programs which, besides their informative, educational, and entertaining function, would present to the children models of behavior, critical thinking, and perception of the environment, for strengthening the system of values and their national self-awareness, and for upholding the purity of the Bulgarian language.

7.12. Conclusion

The relationship between “virtual space” and “real space” requires more thoroughness, especially when children stand between the two spheres. The analysis usually concentrates on why and how children and teenagers turn to and use the virtual space, and what is stronger: the interactive cybernetic world, which skillfully applies manipulative techniques to its young users, or the choice of the children, who through the challenges of TV programs, computer games, or chatting, create their own virtual universe, thus gaining their best from what contemporary information and communication technologies offer. The answer by all means contains arguments for both sides as well as examples of temporary victories of each of them.

Undoubtedly, the information that children receive from the TV screen or the Internet increases their intelligence. Despite the allegations that illiteracy abounds, that children do not read books, that they are killing their time, and that it is bad for their health, surveys show clearly that in the cyber era children are much more practical, know more, and adapt to their environment much easier. Furthermore, being acquainted with the virtual world (which to a great extent is an imaginary projection of everyday life) makes children feel that they are important and integrated into the real world.

The other side of the coin, of course, is that virtual screen information damages children’s eyes, debauches their innocent consciousness, promotes antisocial behavior, and also creates a number of indecent habits, the consequences of which children bear in accordance with real-life rules. A balance can be reached by establishing effective rules for visiting the virtual space, and by teaching children sustainable values that will block any encroachment on their psychological and physical health. Establishing such a balance would evidently require effort, as well as concentrated and coordinated efforts of the children themselves, their parents, their teachers, and all institutions and organizations that consider children their priority.

Contemporary television is a convergent phenomenon, combining the intellectual product with technological potential, market mechanisms, regulatory practices, and response of the audiences. Along with this, television is both a reflection and an embodiment of the

post-modern concept, with its key characteristics of fragmentation, intertextuality, simulation, and plurality.

Considerable progress has been made in the creation of a common EU information space. Telecommunication providers are already offering broadcasting services and content providers—communication services. The goal is for the consumers to be able to watch audiovisual content anytime, anywhere, and on all technical platforms (TV set, computer, mobile phone, personal digital assistant, etc.).

For many years, one of the objectives in achieving a sustainable democratic environment on a pan-European level has been the protection of children from inappropriate media content. Both the Council of Europe and the European Union have been active and productive in discussing the issue through a number of recommendations, resolutions, declarations, opinions, communications, and research papers prepared to reflect the rapidly changing media sector.

The new pan-European actions aimed at further promoting media pluralism and content diversity in the audiovisual sector are of major economic, social, and cultural importance. Television is still the most significant source of information and entertainment for 98 percent of the European households that watch television more than three hours per day on average. However, bearing in mind the rapid technological developments in a highly competitive market, a major concern about the vitality of the new regulatory rules might be how long the pillars of Europe's audiovisual model (cultural diversity, protection of minors, consumer protection, media pluralism, and intolerance against racial and religious hatred) will be protected.

NOTES

¹ It states: "(1) Member States shall ensure that audiovisual commercial communications provided by providers under their jurisdiction comply with the following requirements: (...)

"(e) audiovisual commercial communications for alcoholic beverages must not be aimed specifically at minors as it may encourage immoderate consumption of such beverages;

"(g) audiovisual commercial communications shall not cause moral or physical detriment to minors. Therefore they shall not directly exhort minors to buy or hire a product or service by exploiting their inexperience or

credibility, directly encourage them to persuade their parents or others to purchase the goods or services being advertised, exploit the special trust minors place in parents, teachers or other persons, or unreasonably show minors in dangerous situations;

“(2) Member States and the Commission shall encourage audiovisual service providers to develop codes of conduct regarding inappropriate audiovisual commercial communication, accompanying or included in children’s programmes, of foods and beverages containing nutrients and substances with a nutritional or psychological effect, in particular those such as fat, trans-fatty acids, salt/sodium and sugars, excessive intakes of which in the overall diet are not recommended” (European Parliament and the Council, 2007).

² CSA: *La protection des mineurs à la télévision* http://www.csa.fr/protection_mineurs_TV/; retrieved April 9, 2007).

³ NICAM: *What is kijkwijzer* <http://www.kijkwijzer.nl/>; retrieved April 9, 2007.

⁴ National Statistical Institute of Bulgaria (2003): *Census, Housing Fund and Agricultural Holdings*: Volume 1. Population. Book 4. Households.

⁵ National Statistical Institute of Bulgaria (2003) *Education in the Republic of Bulgaria* <http://www.nsi.bg/>; retrieved April 9, 2007.

⁶ Child Protection Act (2000), available at <http://www.priemime.bg/docs/ZZD.doc>; retrieved April 9, 2007.

⁷ Penal Code (1968), available at http://www.mvr.bg/NR/rdonlyres/330B548F-7504-433A-BE65-5686B7D7FCBB/0/04_Penal_Code_EN.pdf; retrieved April 9, 2007.

⁸ Bulgarian Constitution (1991), available at <http://www.parliament.bg/?page=const&lng=en>; retrieved April 9, 2007.

⁹ Film Industry Act (2004), available at <http://www.filmmakersbg.org/zakon-kino-eng.htm>; retrieved April 9, 2007.

¹⁰ Radio and Television Act (1998), available at <http://www.cem.bg/>; retrieved April 9, 2007.

¹¹ Code of Ethics (2004) (<http://www.mediaethics-bg.org/?op=page&lan=BG&page=codecs>; retrieved April 9, 2007) stipulates:

“2.4.1 We shall demonstrate special responsibility in respecting the rights of children, including their right to be heard.

“2.4.2 We shall not take advantage of the children’s innocence and trust.

“2.4.3 We shall not publish information or photographs about the private life of a child unless there is an overriding public interest.

“2.4.4 We shall protect the identity of children involved in or affected by tragedy or criminal activity, in case it might turn out to be harmful.

“2.4.5 We shall seek to avoid interviewing children without the consent of an appropriate adult.”

¹² National Council for Journalism Ethics (2004) *Ethical Code and Ethics Councils*, available at <http://www.mediaethics-bg.org/?lan=EN2>; retrieved April 9, 2007.

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- ¹³ Bulletin of the Council for Electronic Media (2007) *Country Report for the 25th EPRA meeting*, No. 5.
- ¹⁴ Bulletin of the Council for Electronic Media (2002).
- ¹⁵ Bulletin of the Council for Electronic Media (2003).
- ¹⁶ (www.cem.bg; retrieved April 9, 2007).
- ¹⁷ Radio and Television Act (1998) (<http://www.cem.bg>; retrieved April 9, 2007).

CHAPTER 8

Challenges of Regulation of the Blogosphere¹

ANDREJ ŠKOLKAY

The Internet in general, and the blogosphere in particular as a special branch of Internet-mediated public communication, have brought new regulatory challenges to public communication and challenges to our understanding of freedom of expression. In the case of blogs, one of the most difficult decisions is how much interaction, if any, should be allowed for users. On the one hand, the ability to leave comments, rate articles or photos, and communicate with authors or other visitors encourages readers to return to the site and provides them with a sense of community. On the other hand, uncontrolled content carries a set of dangers and concerns, including copyright and libel issues.

From a regulatory point of view, it seems more and more clear that there is not and should not be a total freedom for anonymous communication, especially for anonymous comments. There are increasingly serious problems with violence promoted by words, i.e. promotion of extreme ethnic, pathological, and religious passions, as well as problems with personal honor and dignity. Many observers have also noted the increasingly low quality of public discourse on the Internet and in some cases, in the blogosphere. A serious discussion is needed about possible methods of regulation, to discuss the introduction of rules aiming at the protection of the physical, mental, and moral development of minors as well as human dignity in all Internet media services.

In this paper, I will first describe current regulatory tendencies concerning the blogosphere. Second, I will briefly discuss three possible types of regulation. Third, I will discuss the most recent European regulatory developments concerning online services, indirectly affecting the blogosphere. Fourth, I will briefly compare the U.S. and German approaches to regulation of the blogosphere. Fifth, I will focus on political

and civic issues of blogosphere regulation. In the final part, I will discuss whether legislation is preferable vis-à-vis the blogosphere, or whether alternatives such as co-regulation or self-regulation should be considered.

8.1. Current issues of the blogosphere

Blogs are necessary in a number of ways for enhancing civil contribution and public input on the Internet. Blogging is a specific phenomenon of public communication that by and large fosters democratic participation but also poses challenges to governments (Školkay, 2006). The blogosphere creates new conditions for crime and violence (not only by words) to thrive on the Web and hate speech to spread due to the new intensive communication online. The blogosphere brings with it “traditional” major issues in communications: dangers of promotion of crime and violence (e.g. pedophilia), hate speech (e.g. racist content and comments), hidden advertising and flogs (the use of “personal blogs” for unfair commercial and political purposes), quality of a discussion (the abundance of emotionally laden discourse), copyright rights, and political marketing through blogs, including the use of fake politicians’ blogs.

An interesting example illustrates the thin line between the public and the private. A court in Finland fined a 15-year-old boy almost €1,000 for slandering his teacher. The boy uploaded to YouTube a video of his teacher. Entitled “Karaoke at Psychiatry,” the video was shot at one of the school’s celebrations.² Although this video was not used as a blog, the consequences were similar to a personal slander in a written form.

There are arguably three major reasons why the blogosphere has taken such a decadent turn, especially regarding primitive anonymous personal or public attacks or comments. First, anonymity is protected. Many bloggers and almost all participants in follow-up discussions protect their true identity. Second, it is a factor of “no sense of place.” Put simply, one does not behave the same way when s/he is confronted face-to-face by a neighbor. Third, there is no—or little—time left for serious thinking. Reactions/comments can be fast due to technological conditions and anonymity that is seemingly (almost) without responsibility. However, producing high-quality ideas, including high-quality evaluation of others’ ideas, takes time.

From a civic viewpoint, therefore, the blogosphere seems to provide a lethal combination of protected anonymity and distance that encourages all types of bizarre individuals to express their deepest—sometimes pathological—emotions, including death threats. This kind of “tabloid conversation” or “trash conversation” is becoming a widespread issue. In addition to “hard” issues of censorship and pornography on the Internet, there also are “softer” problems of decency, libel, and civility in the blogosphere.

These areas of concern can be illustrated by the negative experiences of a former blogger³ in Slovakia. Čuláková’s observations stem from a firsthand and relatively long-term use of the blogosphere; they are generally applicable. First, in her opinion, there are problems with giving preference to some contributions (including the “karma” system, based on feelings of readers, an evaluation system based on readership frequency, and a selection of articles based on editorial decision) and, later, giving automatic preference to some bloggers (known as the VIP system). The logic of this system leads to scandalous writing, especially of headlines, argues Čuláková. The karma system is perhaps closest to the quality goal, because it negates frequency as well as scandalous headlines and underlines interesting content on blogs.⁴

Furthermore, this system can sometimes be abused for a promotion of vested interests, including business interests. Pastier (2007)⁵ describes a case from 2005. A female blogger, Claire, wrote regularly about her “authentic” experiences with cosmetic products, and especially with a new moisture cream by Vichy/L’Oreal. In fact, Claire was an employee of PR agency Jean-Paul. After this scandal was revealed, the company established a new blog in which anyone could write about its products, positively, neutrally, or critically.

Another revealed case of a fake blog (or “flog”) comes from the United States. The blog “Walmarting Across America” was allegedly established by two travelers going across the United States. The travelers often stopped in Walmart stores. As it later turned out, they were paid for their writings—by Walmart. A PR company, Zipatoni, which established a flog for the Sony company, made a fatal mistake. The URL address was registered by the PR agency itself, and some of the published pictures showed Zipatoni’s marketing consultant. Officially, this was supposed to be a blog by two teenagers.

There may also be more subtle ways of influencing bloggers' writings. In 2006, Microsoft, working through its PR agency, Edelman, invited bloggers out to Seattle to meet Bill Gates, with all expenses paid. Towards the end of 2006, they sent selected bloggers expensive laptops, with Vista preinstalled, as a gift. It is an open question whether, even if no *quid pro quo* was formally required, the gift creates a social obligation of reciprocity. A proliferation of fake and PR blogs resulted in the establishment of in-house or self-regulatory ethical codes for blogging by many corporations.

Turning back to the second point made by Čuláková, a blogger does not always want his or her writings to appear in print in a newspaper. However, this happens and can cause conflicts. In Čuláková's case it caused problems with her colleagues—local politicians.⁶ Nevertheless, it is questionable whether, in the future, one should worry more about the printed version of his or her writings than about the online version. It seems logical that electronic publications will soon reach parity with printed versions, at least in terms of social or political impact.

Thirdly, follow-up discussions of articles might prove inefficient and highly emotionally laden. Interestingly, Čuláková compared the Czech and Slovak blogospheres and suggested that discussions in the Czech blogosphere were much less emotional. Some other authors indicated that discussion fora in Slovakia are often overloaded with personal offenses and worthless messages.⁷ In Slovakia, some online portals are unable to delete sufficiently quickly racist or religious remarks by anonymous commentators. Significantly, the articles that raise socially and politically important issues of the day usually do not cause such lengthy discussions.⁸

Fourthly, Čuláková criticized the fact that a pedophile was given a voice in the daily *Sme* blogosphere—for a while at least—but the Jehovah's Witnesses not. In a protest, an initiative against a pedophile blogger emerged in early 2006. The main argument against the pedophile blogger's unrestricted freedom of speech was that, if such extremist opinions were allowed to be published, they needed to be clearly marked as abnormal and commented on by a specialist. Therefore, the authors of the petition asked the administrator either to delete articles romanticizing pedophilia or to add a specialist's commentary to them. After such public pressure, the pedophile blogger stopped

posting. This example shows that ethical as well as legal considerations must be carefully and swiftly taken into consideration when dealing with the blogosphere.

In short, the media create risks for the recipients, while the Internet and new communications augment them for technological, psychological, and legal reasons. The new situation in regulation leads to shifts in the regulatory paradigm, requiring reconsideration of the paradigm and the elaboration of new approaches. The above discussion has raised some important general issues. Is there a threat coming from the danger of violent words? How socially serious an issue is the low quality of public discourse?

Research suggests that violence in words is not, potentially, without consequences. There is now strong evidence that suggests that "mirror neurons" activate in the same way when we are watching someone else do something as they do when we are doing it ourselves. We learn by imitating (mirroring) others. The problem is that these neurons imitate others without our conscious intention. It is hard to resist copying the behavior of others we are around. Neurologist Richard Restak even argues that negative emotions exert a more powerful effect in social situations than positive ones, thanks to the phenomena of emotional contagion.⁹

Marsden (1998) argues that scientific research has largely confirmed the thesis that feelings, attitudes, beliefs, and behavior can indeed spread through populations like a contagion. Simple exposure sometimes appears to be a sufficient condition for social transmission to occur.

User-generated content placed on the Internet provides numerous examples of transgressing boundaries of the control over private images. One American student, Ryan Halligan, was derided for months as some of his schoolmates spread the rumor via the Internet that he was gay. Halligan committed suicide at the age of 13. Fellow students of a Canadian teenager, Ghyslain Raza, put his personal video without permission on the Internet as a joke. Raza was so distraught that he had to be treated in a psychiatric clinic.¹⁰ These examples show that the usage of personal images in blackmailing and similar negative practices are far from uncommon among teenagers. Therefore, we should deal seriously with regulation of the blogosphere, or, to put it positively, with the protection of human rights of others.

8.2. Three possible types of regulation

There are three possible types of regulation: self-regulation, co-regulation, and regulation by law. Self-regulation is a voluntary initiative in which the operators/providers, social partners, non-governmental organizations, or associations adopt common guidelines among and for themselves. In general, EU policies support self-regulation. The EU suggests that effective self-regulation can complement the legislative and judicial and/or administrative mechanisms in place. At the same time, self-regulation should not be treated as a substitute for the obligations of the national legislator.

Co-regulation is usually understood as a legal link between self-regulation and the national legislator. Co-regulation should allow the state to intervene if its objectives are not being met. Regulation by law is the strictest, and not always the most effective, method of regulation. It is applied when both self-regulation and co-regulation work poorly, or not at all.

The EU policies encourage the use of co-regulation and self-regulation. However, these approaches present other shortcomings. They have a limited and closed character, lacking the universality typical of law. Therefore, some experts Zankova (2006) view self- and co-regulation as effective in a form of complementary measures. This interpretation can also be discerned in the European policy documents. For example, the EU suggests, in its recommendation on the protection of children and their dignity and mental health in the new media environment, implementing a multistakeholders' approach (European Parliament and the Council, 2006b).

An initial lack of support for legal regulation, co-regulation, or self-regulation of the Internet-related communication around the world is gradually being replaced by more expressions of need for the three principal regulatory measures, or a combination of them.

8.3. Self-regulation and co-regulation in the blogosphere

In the absence of legal regulation, some have expressed the need for self-regulation of the blogosphere. This need was probably discussed

publicly for the first time in early 2007 by a group of American bloggers.

A well-known Internet “guru,” Tim O’Reilly (2007), and his colleagues outlined a “Blogger’s Code of Conduct.” First published on March 31, 2007, the Code was designed to respond to the firestorm caused by violent and disturbing comments on O’Reilly’s friend’s blog. Significantly, the first rule of this Code urges, “Take responsibility not just for your own words, but for the comments you allow on your blog.” In his commentary O’Reilly wrote that we now have one more clear object-lesson on what we get when a site not only tolerates but encourages mean comments: There is a quick race to the bottom. O’Reilly believes that there is a big difference between censorship and encouraging and tolerating an abuse.¹¹

Pressure for self-regulation on the Internet applies not only to user-generated content. Some media content providers have also agreed on self-regulation with approval by a regulatory body. The UK’s major broadcasters and media content providers agreed in early 2008 to abide by a new set of good-practice principles covering the audiovisual content accessed by users via the Internet and mobile phones. The guidelines, in fact, do not cover user-generated content. The main rationale is to give users enough information to make informed choices about the content they are about to view—whether it is suitable for children, and whether it may offend. The guidelines were supported by the UK’s regulator Ofcom.

News sites typically self-regulate user comments and feedback in at least one of five ways (Bailey, 2008).¹² The first and simplest solution is to reject any user feedback in a public forum. Users may not post anything on the site itself; visitors are encouraged to submit comments via email, often directly to the authors or reporters. The second solution is to allow comments but to have them vetted by a staff member before they go public. The third option is to allow only registered users to comment. All new visitors are required to register for an account, which is usually free, before they can submit comments. The fourth solution allows comments without restriction. While this encourages the highest number of legitimate comments, it also allows spammers to abuse the system. To combat this problem, many sites have staff members review the comments after they are posted. This enables them to remove any comments that violate the rules

and, if warranted, take action against the submitter. While this does not prevent unwanted comments from being published, it can keep a site relatively clean. Such a system is popular with blogs and message boards as well as many smaller news sites. Finally, the fifth option for patrolling an open site is to recruit visitors to help the author. In such a system, users can rate comments. Comments that are voted down are hidden or removed from the site. The problem is that in order for the system to work, a handful of visitors have to see the comment or comments.

Co-regulation in the blogosphere involves cases when one would apply current legislation dealing with general issues of pornography, blasphemy, libel, and so on. This is already the case in most countries that aim to tackle these issues in media policy.

8.4. Legal regulation of the blogosphere

In many countries, no special legal regulations apply to the blogosphere, either in separate laws or as a part of other laws explicitly mentioning the blogosphere. This is due primarily to the novelty of this method of communication and secondly to the belief that existing legislation can safely cover public electronic communication. Alternatively, legal measures cover various aspects of Internet-related communication. At the same time, the legal space is rapidly changing, because there are either specific laws for the Internet providers or for materials generated by users, and/or national courts in Europe increasingly take seriously issues of sexually explicit material, false information, fraud, incitement to violence, harassment, threats, or defamation distributed or published on the Internet. An additional concern is political lobbying in the blogosphere.

Allison R. Hayward identifies three possible strategies for applying domestic law to foreign Internet communications:

“One, governments may pursue the foreign speaker, ‘going after’ offenders outside the country who have assets or a business or some personal presence within the country. Two, they may thwart communications midstream by targeting the service providers, browsers, networks, and financial supporters who make up the domestic end

of the network. Three, they may use filtering technology to censor material, or block access to servers and sites with unlawful content” (Hayward, 2007).

The first alternative, according to Hayward (2007), may be seen as an imposition on the sovereignty of another country, as targeted individuals and groups will tend to resist attempts to impose the national laws of a country far from home. The second and third options also entail shortcomings: They not only target the offending conduct, but tend to cut off all exchange with a particular server, ISP, browser, or search engine. Such approaches may go too far to suppress lawful speech, are difficult to implement, and moreover, can be circumvented by more sophisticated operators.

These reasons may explain the difficulties of, and lack of support for, including the blogosphere in the new Audiovisual Media Services Directive (AMSD) of the EEC. In general, liability of hosts for content placed on the Internet by others is regulated by the EU E-Commerce directive. There is no room for new systems of licensing or administrative authorization on any type of audiovisual media in AMSD either. However, this directive is still useful for discussion as a largely analog regulatory mechanism that deals with very similar and sometimes overlapping issues.

This Directive defines audiovisual media services as mass media. These media services, in other words, are intended for, and could have a clear impact on, a significant proportion of the general public. In practice, this definition could cover the blogosphere, at least in the long run. However, the Directive makes it clear that the blogosphere and websites are excluded from its scope. The Directive states that stand-alone text-based services should not fall within its scope (European Parliament and the Council, 2007). However, Member States can regulate such services at a national level. Nor does the directive cover electronic versions of newspapers and magazines.

Furthermore, the Audiovisual Media Services Directive states that it does not cover activities that are primarily non-economic and that do not compete with television broadcasting, such as private websites and services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest. In addition, the Directive

explicitly excludes any form of private correspondence, such as e-mails sent to a limited number of recipients and websites that contains audiovisual elements only in an ancillary manner (European Parliament and the Council, 2007, p. 29).

Nevertheless, some explanatory notes concerning the Directive are useful for the discussion about regulation, self-regulation, or co-regulation of the blogosphere. For example, the Directive states that “because of the specific nature of audiovisual media services, especially the impact of these services on the way people form their opinions, it is essential for users to know exactly who is responsible for the content of these services” (European Parliament and the Council, 2007, p. 32). Such a measure would be useful to identify who is responsible for the content and comments in the blogosphere. Also, posing the following questions would be instructive: Who generated the anonymous comments? A provider? An editor? Or an author? Or perhaps all three share some responsibility, be it legal or ethical?

The Directive addresses the protection of minors and human dignity: “Measures taken to protect the physical, mental and moral development of minors and human dignity should be carefully balanced with the fundamental right to freedom of expression as laid down in the Charter on Fundamental Rights of the European Union. The aim of those measures, such as the use of personal identification numbers (PIN codes), filtering systems or labelling, should thus be to ensure an adequate level of protection of the physical, mental and moral development of minors and human dignity [...]” (European Parliament and the Council, 2007, pp. 32–33). Certainly, this is an important guideline for discussion about why, how, and what to regulate in the blogosphere.

The Directive forbids distribution of child pornography and urges governments to see to it that audiovisual media services provided by media service providers under their jurisdiction do not contain any incitement to hatred based on race, sex, religion, or nationality. This is again highly topical with respect to blogs and extremist websites. At the same time, relevant provisions covering the aspects mentioned above are laid down in criminal laws.

8.5. The U.S. and German regulation of the blogosphere

In many aspects, there is a fundamental difference between the U.S. and European, especially German, approaches to freedom of speech on the Internet. The German perspective, by and large, marks the prevailing trend in the EU, with the possible exception of the United Kingdom or the Nordic countries. As Hayward (2007) puts it, the U.S. law protects blogging content, but may impose restrictions on the source of political commentary by barring certain funding sources. The U.S. Supreme Court has noted that Internet activity is different from previous forms of communication: Unlike communications received by radio or television, “the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial” (Justice Stevens quoted by Hayward, 2007, p. 4). The Court concluded that the statute could be enforced only if enforcement was limited to obscene communications, which under prevailing precedent are entitled to much less legal protection.

The CDA (Communications Decency Act) also contained a provision that protected Internet Service Providers (ISPs) from liability for material posted in the Internet by others. In the blog context, original blogged material would be deemed “published” by the blogger, but comments (even anonymous ones) posted by visitors would not be attributed to the blogger. Moreover, ISPs cannot be required to identify anonymous Internet posters without a court order. The U.S. Supreme Court reasoned that anonymous Internet speech was the modern-day equivalent of “political pamphleteering” in line with “an honorable tradition of advocacy and dissent” (quoting *McIntyre v. Ohio* in Hayward, 2007, p. 5). In contrast, private legal actions against bloggers in the United States are more frequent. Typically, they take the form of a “cease-and-desist” letter to the author or his ISP requesting that content be removed. American law encourages this ISP reaction, in part by providing immunity from copyright liability if ISPs promptly take down allegedly infringing content.

German law imposes stricter limits on the content of blogging but does not regulate financial sources related to political blogs to the same degree as in the United States. German law protects personal reputation and dignity more vigorously (even allowing them to trump the

right to free expression) and is more ready to bar certain political communications altogether (Hayward, 2007, p. 10). German law also permits private individuals to enforce rights to personal reputation against other private parties (Hayward, 2007).

Under the German Criminal Code, defamation faces tougher standards in Germany. Defamation is defined as an insult made in a person's presence, slander or malicious defamation, or factual claims that harm a person's reputation. To avoid prosecution, the maker of the statement must prove that what s/he said was true. Civil liability in German law reaches further, protecting a person's "personality right" by recognizing three zones. Hayward (2007, p. 11) specifies them as an "intimate zone" containing a person's personal beliefs, health and intimate details; a "private zone" protecting private and family life; and an "individual zone" protecting image and self-determination, such as publishing a photo of another. If these zones are breached, claimants can demand compensation.

If the author of illegal speech is out of reach of the German authorities, they are quite willing to enforce the laws on Internet service providers and hosts. German federal regions (*Länder*) have regulatory authority over media content, and some *Länder* are less permissive than others. It is interesting to note in this context that German imprint laws require content providers to identify themselves. Web sites are included in this requirement, so even amateur sites and blogs have an imprint page listing the author's name, address, and other identification information, including a tax identification number.

European court rulings may offer greater protection than domestic German law but seem inconsistent and thus add uncertainty and ambiguity to the situation (Hayward, 2007). The European position is that the blogosphere must not be regulated like private communication, while the U.S. courts have acknowledged its media-like nature. The crux of the question is what media is in the newly established communications environment. Zankova (2006, pp. 63–64) therefore proposes that Europe adopt horizontal-type regulation. In this so-called "regulatory space," various interested parties work together to achieve a common goal through a combination of legal and other norms, such as voluntary codes, self-regulatory rules, professional guidelines, and ethical norms.

Certainly, a combination of legal and non-legal measures is needed. However, in order to guarantee the effectiveness and social impact

of the regulators, these bodies should embrace both rule-making and controlling powers. Finally, these bodies should be technologically competent and pragmatically oriented (Zankova 2006, pp. 68–69). The arguments mentioned above hold that the U.S. approach (aiming generally at the protection of blogging content, but able to impose restrictions on the source of political commentary by barring certain funding sources), although not always consistent at a state level, generally seems more appropriate than the EU approach.

8.6. Political and civic issues of regulation of the blogosphere

As Raboy (2006) states, communication is a double-edged sword. It has tremendously increased the capacity to participate in public life—at least for those with access to the means. At the same time it has enhanced the ability of governments and corporations to track us, watch us, market us, and eventually, if they deem it necessary, to gag us. This is why policy issues surrounding media—and the choices that they imply—continue to be so important.

Some tendencies towards too-strict regulation can be found in today's international blogosphere. There is a particularly strong tendency to regulate political discussions in the blogosphere in illiberal countries. In China the government decided to introduce new rules governing the publication of blogs and webcasts in 2007. There were over 20 million bloggers in China at the end of 2006, of which 3 million were regularly published. Search engines Google and Yahoo had to accept rules filtering out “sensitive” issues such as the independence of Taiwan or the Falun Gong. The Chinese government temporarily or permanently blocks hundreds of websites. Not all of the Chinese government's motivation is purely political. For example, one Chinese blogger published the names and personal data of all her former lovers. One of the softer methods of regulation suggested by the Chinese government is to secure the true identity of bloggers.¹³

Controversies over the legal and regulatory issues in the blogosphere are worldwide. For example, the Egyptian court sentenced to a four-year term a blogger who had insulted Islam and Egypt's president in 2007. In April 2007, YouTube made an offer to the government of Thailand to block a video which was regarded as offending the Thai

king. Tunisia, the United Arab Emirates, Saudi Arabia, and Bahrain have blocked access to the secular portal Rezaggar.com.

While regulation of the blogosphere in illiberal countries is not so different from regulation of the traditional media, liberal countries are more challenged by this new arena of communication. There has been a broad consensus that, in practice, regulation of the blogosphere should rely on democratic, clear, and transparent institutions and procedures.

The blogosphere brings new challenges to politics at local, national, and international levels. For example, a famous U.S. blogger, Matt Drudge, put on his blog a translation of the skeptical speech on global warming given by Czech President Václav Klaus. This seems the most likely way that American conservatives learned about this speech—from other U.S. blogs that cited this translation.

As mentioned earlier, problem areas appear from fake political or politicians' blogs, but also fake expert or company blogs too. It is still an open question how we should deal with this phenomenon.

A case study of protection of copyright can be instructive here. Initially, it seemed that the Internet would provide a very spotty view of human knowledge, because most owners of copyrighted information were reluctant to release it in this freebooting realm. But the Internet has become available for an extended use at a marginal cost compared to that of the commercial databases. In contrast to a commercial sector offering copyrighted information for sale and thus discouraging browsers, the Internet is full of people browsing. As a result, the boundaries of and terms of use of copyright are under constant redefinition. Regulatory issues concerning the Internet in general and the blogosphere in particular are challenging our traditional understanding of freedom of expression and communication.

8.7. Conclusion

This chapter has attempted to outline some important emerging regulatory issues related to the blogosphere. The blogosphere may or may not be a vivid alternative public sphere. But it certainly brings new controversial issues and regulatory challenges. Some advice on how to maintain blogs ethically and legally can be found in Franklin (2007).¹⁴

In May 2007 a new initiative appeared in the blogosphere that might help avoid some of the problems mentioned above. The initiative, called "The Face Behind The Blog Collection," was inspired by a Chinese proverb: "One picture is worth 10,000 words." The idea behind this initiative is that putting a face to the name of someone you have not met helps recognition and adds a more personal feel to your conversations. This is perhaps one attempt at the self-regulation of the blogosphere. Another example represents a work on the code of ethics for technology companies like Microsoft, Google, Yahoo, and Vodafone, operating in countries such as China and Vietnam that practise censorship.¹⁵ This code of ethics should deal not only with blogs but with Internet communication in general.

In other areas, the police or judiciary usually takes charge, as has already happened in Germany, the United States, and Slovakia. If there is no self-regulation, or if it fails, legal regulation takes place. The scope and use of this regulation greatly depends on national tradition in each country. There is little chance that this truly borderless communication will be regulated at the EU or, indeed, international regulatory level.

NOTES

¹ This paper greatly benefited from comments by Dr. Beata Klimkiewicz from the University of Krakow, Poland, and Dr. Bissera Zankova from St. Kliment Ohridsky University in Sofia, Bulgaria.

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CHAPTER 9

Audience Resistance:

*Reasons to Relax Content Regulation*¹

PÉTER BAJOMI-LÁZÁR

9.1. The puzzle of rhetorical unpopularity vs. practical popularity

Commercial television is unpopular *and* popular. It is unpopular in the sense that audiences tend to despise it for its “low quality,” “sensationalism,” and “disrespect” for privacy. And it is popular in the sense that it has a high audience share. In fact, more people watch commercial television channels than their public service counterparts in nearly all European countries (Open Society Institute, 2005).

The contradictory nature of the public’s position on commercial television is also mirrored in broadcasting regulation, which, in most of Europe, allows commercial broadcasters to operate, yet seriously limits their activity. Policymakers and lawmakers tend to consider commercial television a kind of “necessary evil.” In order to protect citizens from the assumed negative impact of commercial television, they engage in positive and negative censorship. On the one hand, broadcasting regulation imposes classic public service obligations² upon commercial broadcasters, such as offering news regularly. On the other hand, it restricts the airing of particular content such as violence, hate speech, and pornography (Open Society Institute, 2005).³ As a general rule, broadcasting regulation in Europe places public service broadcasting first. Even the regulation of commercial television is rooted in a normative perspective that is based upon the public service broadcasting ethos.

What explains the puzzle of rhetorical unpopularity and practical popularity that commercial television enjoys? Why do many viewers say that they despise commercial television *and* keep watching it? In this chapter, I will recall theories that might help to answer these

questions. Reviewing previous research on how viewers receive television programs, I will argue that audiences are resistant to what is generally believed to be “harmful” content, which makes restrictive content regulation unnecessary.

Liberal media policy analysts put forward various arguments for the relaxation of content regulation imposed upon commercial television channels. Some note that commercial broadcasters tend to sabotage public service obligations: Either the programs they air fail to be *real* public service programs and meet purely commercial purposes (such as their infotainment magazines disguised as news programs), or they do not broadcast public service programs at all but choose to pay a fine. This makes regulation senseless and regulatory authorities ridiculous (Kertész, 2006). Others say that the “self-correcting processes” of the media market regulate content sufficiently and adequately; that is, private interests ultimately meet the public interest. Programs that fail to meet the expectations of the audiences leave the small screen quickly. For example, the reason why most commercial television channels do not show hardcore violence and pornography is that there is no massive demand for such programming; viewers use the remote to communicate their wishes. Competition, i.e., the Smithian “invisible hand of the market,” makes regulation by the state a useless and hence a senseless venture (cf. Keane, 1991). Yet others point out that national regulation is easy to ignore in the era of global mass communications. All investors have to do is register their television channels in a country not regulated by the target territory, and transmit programs via satellite or cable to their destination, or just use the Internet to reach their audiences (cf. Bajomi-Lázár, 2006). In this chapter, I will use another approach to argue for the relaxation of content regulation: one that contrasts traditional media policy principles with theories of audience resistance.

9.2. Critiques of the commercial media

Critics have focused their attention on the commercial media in at least three successive waves. The first wave of critique was voiced in the mid-20th century. Based on earlier works by Karl Marx and Karl Bücher, Max Horkheimer and Theodor Adorno of the Frankfurt

School used such terms to describe the popular mass media (at that time, newspapers, cinema, and radio) as “commercialization” and “commodification,” pointing out that cultural goods had become products to sell. They introduced the concepts “culture industry” and “knowledge industry,” claiming that the media were able to shape audience tastes negatively (cf. Frith, 1997; McQuail, 1994).

The second wave of critique was launched in the 1960s, when commercial television reached a mass audience in the United States, and fears of the media’s negative impact were on the rise. In this spirit, George Gerbner published his *cultivation theory* in 1969, claiming that heavy viewers of television have a biased perception of reality, as they apply the information gathered from the virtual reality of television to the real world. He further argued that, in addition to television’s negative impact on people’s opinions and attitudes, television also affects their behavior negatively. For example, heavy viewers are more likely than light viewers to support such violent resolutions of conflict as the death penalty (Gerbner, 1969).

The third wave of critique emerged in the 1980s and 1990s, when U.S. television channels began to air such programs as *Cops*, *The Jerry Springer Show*, and *The Osbournes*, and when commercial television reached continental Europe.⁴ These new programs offered a mixture of fiction and reality and had unprecedentedly high ratings, even though critics called them “junk TV” or “trash TV” (Hammer, 2006). A version of this line of critique was the thesis commonly referred to as cultural imperialism, media imperialism, or television imperialism. It suggested that geopolitical centers, and especially the United States, use the mass media, rather than the army, to conquer the peripheries. The media, it said, are a means of economic and cultural colonization (also referred to as “Coca-Colanization” or “Dallasization”) designed to globally enhance the symbols of U.S. culture and thus to create a global market ideal for the American economy (e.g., Schiller, 1973; see also Ang, 1995; Frith, 1997; Bajomi-Lázár, 2000). In a similar spirit Edward Herman and Noam Chomsky published in 1988 their *framing theory*, (whose roots go back to the 1970s), claiming that the modern mass media are controlled by the political and business elites, and promote the ideology of liberal capitalism (Herman and Chomsky, [1988] 1994).

Critics of the commercial media have a wide range of targets, including tabloid news programs. They claim that information has given

way to entertainment, i.e., “human interest stories” rule over “public interest stories.” As a result, citizens are unable to make informed political choices which, in the end, may bring down popular sovereignty and the democratic system (Kunczik, 2001; Bourdieu, 1999; see also Császi, 2003a; Rigó, 2007). Television shows, especially talk shows and reality shows, are also a target, partly for their “disrespect” for privacy, and partly because, stressing their roots in reality but widely using fiction, they “misguide” viewers (cf. Császi, 2005). Violence and pornography are also a prime target: The political elites and the mainstream of the public think they have a negative impact as they offer “models” for misbehavior, presenting “deviation” as the norm to follow (cf. Szigeti, 2005).

Critiques of the commercial media by the elite intelligentsia have made it, through the school, the church, the quality press, and the public service media, to the public. Quite paradoxically, even tabloid newspapers and commercial broadcasters tend to despise and criticize tabloidization and commercialization. Currently, the widely shared and largely vulgarized version of the critical positions above states that commercial broadcasters deliver mass-produced, repetitive, cheap, and poor-quality content to the audiences. Their ideology is commonly described as “consumerism,” and their end result as the production of “consumer idiots” on a massive scale. The mass media, it is said, suggest that consumption is *the only way* to happiness: The more you buy, the more you spend, the happier you are. People under the impact of commercial television are believed to search for happiness in private life, to ignore public matters, and to let political decision-makers decide for them. The commercial media turn “citizens” into “consumers,” not only with the commercial advertisements they broadcast, but with the totality of the content they air, as ads tend to structure their entire programming. The commercial media harms good morals and good taste; they do bad to people—especially to minors who, because of their young age, are considered more vulnerable than adults (cf. Keane, 1991; McQuail, 1994).

The widespread nature of such views is attested to by many commonplaces regarding television, such as “television equals power,” “people must be taught to select among television programs,” “television is a weapon,” and “television is the real opium of the people” (see Hernádi, 1995; Dessewffy and Gayer, 1999). Such commonplaces

portray television as an agent of power, and portray viewers as victims unable to protect themselves.

Although many researchers have contested these three waves of critique, critiques of the critiques have barely left the realm of low-circulation media and communications journals and are almost completely unknown to the public. The allegations made by the Frankfurt School were questioned on the ground that most media products bring no profit. For example, out of ten music records, nine make a loss. Moreover, most of the media's popular "stars" were first discovered by local audiences, and only *then* promoted by media professionals. These examples allow Simon Frith to conclude that "...on the one hand, *the public does not want most of what is offered to it*, on the other, the biggest profits tend to come from books and films and records which create their own, *unexpected* audiences, which 'cross over' (thus creating a new taste map, a new blueprint for formulaic production" (Frith, 1997, p. 170; first emphasis added). In other words, it seems that the "culture industry" or "knowledge industry" does not significantly shape public taste.

Cultivation theory, which was based on quantitative research methods, has been criticized for failing to analyze the actual messages of television texts, even though the meaning the viewer actually associates with them is determined by the context, as well as the receiver's state of mind and social status (Morley, 1992). For example, a man's death on the small screen may either be a murder, or the outcome of an act of self-defense or the result of an accident, depending on the circumstances. Furthermore, the alleged correlation between the amount of time devoted to television and the inclination to accept aggressive behavior is unclear. As Pierre Bourdieu notes, the poor and the uneducated spend more time watching television and are more ready than the better-off and the higher educated to engage in aggression (Bourdieu, 1973). It may be the case that the correlation perceived by Gerbner is a spurious one, as both of the variables above—i.e., being a heavy viewer and being aggressive—are explained by a third, independent variable, namely social status (Bajomi-Lázár, 2006).

As for the theories of cultural imperialism, critics note that there are a number of "filters," such as the adaptation of global media format and content to local needs, that lessen the estimated impact of media globalization upon national cultures and values (Croteau and Hoynes,

2000). Furthermore, they note that the terminology of colonization is unwarranted, to the extent that the use of the media is “self-chosen and not the result of imperialism” (McQuail, 1994, pp. 115–116). As regards *framing theory*, one can make the objection that it is largely selective in that it ignores well-known instances of the mass media being an agent of change, rather than of continuity (for instance, during the McCarthy hearings). Such instances demonstrate that the media may also speak for the general public, not just the political and business elites. In the case of McCarthy, Ed Murrow of the mainstream television network CBS largely contributed to the fall of the militant anti-communism that was then a key element of official state ideology (Bajomi-Lázár, 2006). Also, framing theory ignores instances of citizen journalism. An example of this is the “Rathergate case,” when independent bloggers revealed that the so-called Killian documents, presented by Dan Rather on CBS and questioning President George W. Bush’s integrity, had been faked (cf. Rowbottom, 2006).

The critiques of the commercial media have infiltrated not just the scientific and the public discourses, but also the media policy and the political discourses. The fact that the critical approaches are widely shared by the populace provides media policymakers and lawmakers with symbolic ammunition when imposing restrictive regulations upon commercial broadcasters. Of course, the private media are, both as potential agenda setters and watchdogs of democracy, a major rival to the political elites. Popular fears of the negative impact of the commercial media offer an excuse that is easy to communicate to the public when political decision-makers seek to control their broadcasting rivals by imposing rules and sanctions upon them.

9.3. A new media landscape: the rise of neotelevision

With commercialization from the mid-1950s onwards, the television landscape has been transformed in Europe. The monopoly of public service broadcasters was over once and for all. The very essence of television broadcasting has changed: To use the terms Umberto Eco introduced in 1983, this is the era of neotelevision (*neotelevisione*). Its distinguishing features, as compared to ancient television (*paleotelevisione*), are as follows:

1. *Contact*: The primary function of television is no longer the representation of reality but, in an effort to raise and hold attention, the maintenance of permanent contact with viewers.
2. *Self-referentiality*: The traditional, static programming structure of ancient television, composed of separate program items, is now over. Today, television offers a dynamic flow of programs linked to one another like a chain, and creating a self-referential system. A series of self-promoting slots refer to forthcoming programs in order to permanently maintain viewers' curiosity.
3. *Hybridization*: In an effort to maintain viewers' attention, neotelevision entertains on a permanent basis. The result is the airing of various hybrid programs such as edutainment and infotainment magazines and reality shows.
4. *Interactivity*: In an effort to improve public responsiveness to television, editors seek to involve audiences in the production process. Viewers appear on the small screen in both internal shots (as the audience in the studio) and external shots (as "people on the street"). Interactivity has also been promoted by digitalization, a development unforeseen by Eco: viewers' feedback has been significantly improved by such new technologies as the sending of e-mail and SMS messages.⁵

As a result of these changes, television, an "empty" medium which, for a long time, only reproduced other means of cultural production such as the theater, cinema, radio, and even the school and the church, now produces programs specifically designed for the small screen and has created a new language and new genres (for the concept of neotelevision, unused in the English literature, see Jenei, 2005, in Hungarian).

To Eco's concept of neotelevision, Lajos Császi adds that of the "neomedia," arguing that the specificities above apply to a variety of media outlets today, including the print press, radio, and the Internet (Császi in Neotelevízió, 2006). Many of the quality newspapers have been tabloidized (hybridization), tabloid newspapers interview "people on the street," lifestyle magazines publicize an increasing number of readers' letters (contact, interactivity), weekly magazines' tables of contents now include an illustrated promotion of what is inside, and webpages redirect readers to their previous writings (self-referentiality).

The concept of neotelevision/neomedia may be considered a general framework of interpretation that allows theorists contesting the above critiques of commercial media to describe how commercial television operates.

9.4. A critique of the critique

The critical approaches to commercial television described above are rooted in two normative assumptions. First, they are based on the Habermasian concept of the public sphere, which defines the mass media as a means of information transmission as well as a sphere for critical and rational debate among adult and equal citizens on matters of public interest. It is this *rationality argument* that ultimately serves as a normative basis for public service broadcasting. And second, they are based on a firm belief that the mass media are a powerful means to shape public opinion and behavior. It is this *effect argument* that ultimately justifies state intervention, i.e. restrictive content regulation.

Both of these assumptions, however, seem to fail to hold, and the approach based upon them does not explain how commercial broadcasters operate. The rationality argument lacks empirical evidence: It is most contestable that people make (political or other) choices on a rational basis and that, as it should follow, the populace must become informed via the mass media in order for the democratic system to operate. The perception of media messages is largely selective: In an effort to reduce cognitive dissonance, people search for media content that complies with their own concepts of the world, and avoid those that conflict with their views (Klapper, 1960). In fact, modern political communication is based on an assumption that defies the rationality argument: People are believed to make political decisions on an emotional basis—hence the short and predominantly visual messages that modern spin doctors like to operate with (cf. Navracsics, 2005). It is very likely that people rationalize their decisions *after* they have made them. In short, there might be other uses of the media that just do not fit into the Habermasian model (Jenei, 2005).

The effect argument is even more contestable. There is no room here to summarize a long tradition of media effects research and reception studies. Let us simply say that empirical evidence suggests that, at

least in a plural media landscape and social environment where audiences are exposed to a variety of socializing agents such as the family, friends, the school, the church and the workplace, the media have only a limited impact upon public opinion and behavior. As David Morley sums up in his classic case study on how people watch television,

“[W]hat one may find interesting may bore another. One person may respond positively to the government spokesman’s latest announcement about economic policy while another may feel like throwing the cat at the television. [...] Because we all bring to our viewing those other discourses and sets of representations with which we are in contact in other areas of our lives, the messages that we receive from the media do not confront us in isolation. They intersect with other messages that we have received—explicit and implicit messages, from other institutions, people we know, or sources of information we trust. Unconsciously, we sift and compare messages from one place with those received from another. Thus, how we respond to messages from the media depends precisely on the extent to which they fit with, or possibly contradict, other messages, other viewpoints that we have come across in other areas of our lives” (Morley, 1992, pp. 76–77).

Critics of commercial television say that commercial broadcasters do not transmit cultural and societal “values”—that is, they expect them to behave like agents of socialization and meet public service functions, and evaluate them accordingly. What is “valuable” and what is not is, however, a matter of definition, that is, a matter of power. It is a function of which of the competing social groups are capable of positioning their own personal or subcultural values as cross-society values. While in a monopoly position, public service television channels broadcast programs that were a reflection of the modernist value-concept of the intellectual elite, that is, values that “stand the test of time.” This concept was based on the unspoken premise that there is but *one* reality that can be empirically discovered or, in other words, there are absolute values. The public service media was rooted in the belief that the meaning of a message is a given and self-evident and that, consequently, the media can transmit values and thus turn chaos into order; i.e., the (public service) media were believed to be able to provide

audiences with the one and only “adequate” understanding of the world. By contrast, the inherently plural commercial media are a post-modern phenomenon, the product of an era that no longer believes in one single reality and hence is open to a multitude of competing values and alternative understandings of the world—that is, the relativity of values (see also Keane, 1991; Ang, 1995; Fiske, 1997).

In this context, supporters of commercial television frequently argue that critics are elitist and paternalistic. They say that promoters of the public service media use broadcasting regulations to impose their own values and tastes upon commercial outlets and their audiences, i.e., in the end, they defy the very rules of the game that democracy is based upon. Critics such as media mogul Rupert Murdoch argue that “[a]nybody who, within the law of the land, provides a service which the public wants at a price it can afford is public service” (quoted in Keane, 1991, p. 125), suggesting that “true” public service programming would be provided by market-based commercial outlets. If citizens are free to choose the laundry detergent or the political party that suits them best, then they should also be free to choose the television program they prefer, the argument goes.

State intervention into the media, and hence the primacy of the public service broadcasting ethos, is rejected on the ground that it treats citizens like minors, even though political decision-makers have no mandate to decide on matters of value and taste. Or, to put it more radically: media regulation authorities that impose content regulation upon commercial broadcasters and sanction its non-observation behave like a censorship commission or the taste police.⁶ Policymakers and lawmakers who defy the principle that the state should stay neutral defy the political equality of citizens, as they prefer the values of some citizens over those of others.

The ideology of commercial broadcasting, at least in Europe,⁷ is the negation of the ideology of public service broadcasting. Thus it is no wonder that it met widespread resistance among supporters of the public service media. According to Császi, this resistance is a sign of frustration with the intelligentsia, provoked by the fact that intellectuals have lost their traditional hegemony in defining societal values, and fostered by the fact that commercial broadcasters speak the language of non-elites and address issues that are of interest, mainly, to non-elites (Császi in Neotelevízió, 2006). The intelligentsia’s loss of hegemony

in defining societal values may, in the end, bring into question the very legitimacy of many of the intellectual professions.

The situation, I believe, is even more complicated than the one Császi describes. The normative approach that is a reflection of the intellectuals' vision of society and of the mass media still determines the public discourse (while the audience share of public service broadcasters has been steadily declining and that of commercial ones increasing over the past decades). Rhetorically, non-elites identify themselves with the elite position questioning the legitimacy of commercial television, the vehicle of their very own (popular) culture, while they spend most of their non-working hours watching commercial broadcasters. The "masses" speak and act differently. There is a contradiction between publicly spoken opinion and privately adopted behavior. The rhetorical unpopularity and the practical popularity of commercial television yields *collective hypocrisy* that is institutionalized in media regulation.

9.5. The act of reception

Researchers who contest the critical approaches to commercial broadcasters and search for an explanation for the success of commercial broadcasters/neomedia theorize in the context of the postmodern, that is, in the context of the freedom to create meanings. They focus upon the act of reception, and study why and how people use mass communication.

Jay G. Blumler and Elihu Katz's uses and gratifications model of 1974 was a milestone in this research field. They argue that people are not passive consumers of media content but active and selective users who "use communications [...] to satisfy their needs and to achieve their goals" (Blumler and Katz, 1974, p. 22), i.e., among other things, to get information, to have a basis for social contact, and to escape from real-life problems (see also McQuail, 1994). This theory yielded a paradigm shift in that research no longer focused on the impact the mass media have upon the audiences (as the normative approach would suggest) but on how the audiences receive messages (as the new, interpretative approach suggests; see also Jenei, 2005).

It was in the spirit of this interpretative approach, as well as the polysemy theory put forward by Valentin Volosinov in 1975, that the

encoding/decoding model, most frequently linked with Stuart Hall's 1980 writing, was given birth. This theory states that messages have multiple readings, and viewers are free to either accept or reject or negotiate the preferred meaning of a message; the key term thus being *audience resistance* (see also Geraghty, 1997).

Another milestone in this research field was Daniel Dayan and Elihu Katz's 1992 theory of media events, which states that the live broadcasting of salient historic events attracts viewers not only because they seek information about them but also because they can feel they are more than just witnesses: They are part of them. The concept of *audience participation* implies that television viewers collectively and interactively participate in the construction of meanings, which thus contributes to the establishment of consent and the integration of society.

Based on works by Emile Durkheim and especially James Carey, Tamás Terestyéni argues that the classic model of mass communication needs to be reconsidered. Traditionally, the mass communication process was interpreted in the framework of the *communication-as-transmission* model; this normative approach conceived of mass communication as the vehicle of information (i.e., television would be a "mirror," or "window to the world," see also Geraghty, 1997). Mass communication was primarily described as a one-way flow of information, as was the case with public service broadcasters/ancient television. The way commercial broadcasting/neotelevision operates, however, is better described in terms of the *communication-as-ritual* model, an interpretative approach that states that (mass) communication is primarily about participation, that is, participation in social life and hence in the construction of commonly shared norms and values. Accordingly, mass communication is not just a vehicle of information, but rather an instrument contributing to the construction of community (Terestyéni, 2006; see also Ang, 1995; Istvánffy, 2005).⁸

Ágnes Jenei argues that commercial television channels, and especially talk shows, create a new kind of democratic public sphere, in that they involve viewers in social communication and the construction of norms:

"The reason why commercial television is popular is not that it provides viewers with information about the world. It is successful because it helps us to be a part of that world and to feel good in that

world. It is successful because it effects our emotions, because it uses an understandable and popular language, and because it presents the important issues and the possible meanings [...] of life in such a way that *it allows audiences to question the very allegations it makes*. It offers a multitude of truths, values and roles that viewers are free to select from” (Jenei, 2005, p. 17; emphasis added; my translation—PBL).

Jenei suggests that the secret of commercial broadcasters/neotelevision, as opposed to public service broadcasters/ancient television, is that they no longer speak as if from “above,” nor do they seek to share great “truths” with their audiences. On the contrary, unlike traditional public service broadcasters, whose authority went unquestioned, commercial television channels enable viewers to “talk back,” i.e., to create their own positions (Jenei, 2005). Whereas public service broadcasters were engaged in a monologue, commercial broadcasters seek dialogue. Neotelevision does not pretend to be objective but offers a variety of knowingly subjective positions. To these positions, viewers can react: They are free to associate themselves with or dissociate themselves from them.

At the same time, it needs to be noted that, since the rise of commercial television, public broadcasters in many European countries have gone commercial in the sense that they offer, just as their private counterparts do, a wide range of infotainment, edutainment, politainment, and other hybrid programs. Hence the concept of neotelevision may also apply to the “new generation” of public service broadcasters; that is, the way how audiences perceive public service broadcasting may have changed.

9.6. Infotainment, talk shows, violence, and porn

Researchers have devoted several case studies and analyses in the spirit of the communication-as-ritual model to the most frequently criticized genres of commercial television, namely tabloid news programs, talk shows, violence, and pornography.

The critique of *infotainment magazines* is rooted in the communication-as-transmission model. It states that tabloid news programs are supposed to provide viewers with adequate information of the real

world but fail to do so. By contrast, the communication-as-ritual approach suggests that tabloid news not only informs but, first and foremost, offers various frameworks of interpretation of the events covered: Real-life events are depicted as part of a gigantic struggle between Good and Evil, and thus neotelevision leads viewers from Chaos into Order. It offers viewers an opportunity to take a position, i.e., to morally accept or to reject or to negotiate the preferred meaning of the events depicted, and thus to play an active role in the construction of reality. In order to do so, commercial broadcasters cover issues that are of interest to the masses, that is, issues that “common people” can relate to, and thus yield high ratings (Carey, 1988; Császi, 2002).

A similar explanation seems to hold for the success of *talk shows*. Such programs also cover issues that are of interest to all. István Síklaki points out that talk shows cover social relations and that

“[...] it is a base psychological need for one to be involved in social relations. Some 80 percent of our daily conversations deal with social relations. [...] Talk-shows cover such issues in 90 percent of their air-time. [...] What really happens is that traditional gossip, once physically located in the marketplace or the workplace, becomes [through the mass media] a massive interactive game and, because we all are responsive to such issues, it generates high viewership rates” (Síklaki in Neotelevízió, 2006, p. 46; my translation—PBL).

Síklaki argues that the practical popularity of neomedia lays in the opportunity of control that they offer to viewers: By sitting in talk-show studios, sending SMS messages or home videos to the broadcaster, they feel like they are taking an active part in the editing process (Síklaki in Neotelevízió, 2006).

Public service television traditionally addressed the “citizen,” while commercial broadcasters focus—as Jenei notes—on the private individual. Public service television covers public issues, neotelevision deals with private ones. Commercial broadcasters seek to reach everyone, not just the intellectual elites who are, as regards profitability, relatively weightless. This is why they put those issues on the agenda that are familiar to and important for all, and that everyone has an opinion about, namely sex, love, marriage, and the transgression of social norms (Jenei, 2005).

As regards the practical popularity of programs displaying *violence and pornography*, Stanley Cohen's 1973 theory of moral panics may offer an explanation. According to Cohen, the reason why tabloid newspapers and commercial broadcasters extensively cover negativity and "deviance" such as prostitution, drug abuse, and the like is that audiences like to reconsider social norms and to redraw the line separating Good from Evil. In other words, the outcome of the transgression of norms is either the consolidation or the loosening of those norms. Audiences like to decide for themselves, i.e., to either negatively or positively evaluate the transgression of norms, and commercial broadcasters meet this need. Similarly, violence and pornography on the small screen are not simple behavior models to follow, but offer viewers a chance to dislike and despise them (Kitzinger, 2000; Császai, 2003a; Szigeti, 2005).

Thus the reason for the puzzle of rhetorical unpopularity vs. practical popularity probably lies in the fact that the neomedia do not require audiences to identify with their messages. On the contrary, the content the neomedia offer to viewers allows audiences to formulate their own positions and to voice their aversions. The aversions provoked by the content that the neomedia deliver are projected to the vehicle of this content: the commercial media. This is why people despise *and* keep watching commercial outlets.

9.7. A critique of the critique of the critique

Theories seeking an explanation for the high ratings of commercial broadcasters implicitly or explicitly contest the critiques of the commercial media and hence the imposition of restrictive content regulation upon commercial broadcasters. They do legitimize the commercial logic; they do not imply, however, that all regulation is unnecessary.

The fact that broadcasters are costly to operate and investments bring profit, but only in the long term, distinguishes the media market from many other industries. Commercial broadcasters serve only those niches of the audiences that can afford to pay through commercial advertisements. The "invisible hand" of the media market communicates the expectations and needs of the masses, and only them. Commercial broadcasters may cover issues that are of interest to every viewer, but do

not cover every issue that is of interest to viewers. The particular values, needs, and interests of the various minorities that are underrepresented in both the political and the economic institutions, are not given a voice in the commercial media. Commercial broadcasters do not serve all.

If the market does not cater to all, the state must do so, which makes a certain deal of regulation necessary. Regulation must correct market imperfections, and in particular make sure that minorities are given a voice. Therefore community and public service media outlets need to be given certain privileges (such as access to terrestrial radio and television frequencies) and be protected from market pressures.

9.7. Conclusion

Critical approaches to the commercial media are normatively based in the public service broadcasting ethos. Public service broadcasters were expected to “elevate” people: to deliver morality, good taste, and knowledge to the homes of viewers, i.e., to have an impact upon society. The fact that some researchers approach commercial broadcasters from this normative perspective, rather than analyzing them in their own terms, may seriously hinder the understanding of how they operate and, consequently, their function in social communications.

The critical approach to the commercial media may be summed up like this: The neomedia have a negative impact upon society, and therefore they need to be regulated restrictively. Because the market does not regulate content adequately, the state must act. However, taking into consideration theories and empirical findings that help to explain commercial broadcasters/neotelevision’s high ratings, one must conclude that the media are, primarily, a *follower*, not a *leader* of public taste and opinion: They do not manipulate, but meet public expectations. It is not the media that “use” people (or more precisely, it is not the political and business elites operating the media that use the masses manipulated by the media to meet their own purposes), but viewers who use the media (to meet their own needs and goals).

Unlike the ancient media, the neomedia do not offer a one-way, downward flow of information but two-way and interactive communication that provides those “below” with the opportunity to take positions of resistance, participation, and control. In the era of

multi-channel television and diverse content, traditional media policy principles positioning viewers like minors are contestable, as they deny them the chance to autonomously decode—that is, accept, reject, or negotiate—media messages.

The usual argument underlying the strict regulations imposed upon commercial broadcasters is that freedom of speech can be limited only in the event that some higher value—in this case, the protection of citizens from harmful content—makes it necessary. Theories and evidence of audience resistance question this argument and make restrictive content regulation unwarranted.

NOTES

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² The term “classic public service obligations” is used here to denote the approach originally cultivated by John Reith, first director general of the British Broadcasting Corporation, who advocated the “education and elevation” of the masses as the primary function of public service broadcasters.

³ For example, the Broadcasting Act of Hungary prescribes that “the [commercial] broadcaster shall provide public service programme items in at least twenty-five percent of the daily programme time. These items shall be placed in prime time so that their weekly average will reach twenty percent. [...] Programmes which are harmful for the personal developments of minors, especially those which show violent actions as a model or depict sexuality without human aspects shall only be broadcast between 23:00 and 05:00 hours” (Para. 129. (4) a) and 2. (19) Act I of 1996 on Radio and Television, as amended by Act XX of 2002).

⁴ The first European country to have a commercial television network was the United Kingdom in 1955. Commercial television reached the rest of Western Europe between the 1970s and the 1990s, and East Central and Eastern Europe in the 1990s.

⁵ In addition to the widespread use of the remote control, viewers can shape content by, for instance, talk shows in which they can ask questions of the shows’ guests, or reality shows in which they can decide via SMS-voting which character stays and which goes.

⁶ In Hungary, for example, the National Radio and Television Board has two agents to watch for potential violations of content regulation: the Monitoring

and Analyzing Service and the Complaints Commission. The former monitors news programs on a regular basis, while the latter investigates cases in the event complaints are submitted. The authority may impose fines on broadcasters whose news programs break the rule of internal pluralism or show “violence as a model” or, by way of sanction, obliges them to suspend broadcasting (see also footnote 2; for details on content regulation in Hungary and the sanctioning thereof, see Bajomi-Lázár, 2005, pp. 806–812, 817, 839–840).

⁷ In the United States, public service broadcasters in the European sense of the term (i.e., educational or non-commercial or public broadcasters in the U.S. terminology) were never in a monopoly position, and their audience share has always been negligible (Engelman, 1996).

⁸ The etymology of the term communication confirms this approach. The original meaning of the Latin verb *communico*, *-are* was “sharing something” or “uniting with somebody,” i.e., to have something in common with somebody, or to create a *community* with someone (cf. Kiss [1997] qtd. in Nyíri, 2001, p. 7).

CHAPTER 10

From PSB to PSM:

A New Promise for Public Service Provision in the Information Society

KAROL JAKUBOWICZ

10.1. Introduction

There is no shortage of gloom-and-doom forecasts concerning the future of public service broadcasting (PSB), or rather the possibility that it may have no future. Thomass (2007) has noted that PSB is likely to celebrate its hundredth birthday in 2020, but only if it can renew itself by that time. This does not indicate great confidence in PSB's future.

Some of those who formulate such forecasts would indeed like to see an end to PSB. Others feel that PSB should continue but are warning that, without intervention, its future may be in jeopardy. Below are two examples of this latter approach.

In 2002 the Digital Strategy Group of the European Broadcasting Union presented a report (Digital Strategy Group, 2002) in which it summarized the processes of technological and other change unfolding in the broadcasting landscape and warned:

As a consequence of the new environment, if they take no action, there is a risk that public service broadcasters will find themselves marginalized, or relegated to simply providing television services for those who cannot afford to pay TV. Public service broadcasters must rise to meet the challenges of the new environment. Their present structures will not do. They have to adapt themselves, in order to play their full and rightful part in the new media environment.

The report notes the importance of the regulatory environment and government policy in finding an answer to the dilemmas facing PSB in the digital environment.

In 2004 the Parliamentary Assembly of the Council of Europe took up this issue in its report on public service broadcasting (Council of Europe, Parliamentary Assembly, 2004a) and warned, “if PSB could be prevented from modernizing, it would become a relic of the past.” The Assembly recommended that the Committee of Ministers of the Council of Europe “adopt a new major policy document on public service broadcasting” and “endeavour to ensure that the World Summit on the Information Society gives proper recognition to public service broadcasting as an important element of developing the Information Society and at the same time easing the shock of rapid change that it will involve.” It also called on the governments of Member States to “reaffirm their commitment to maintaining a strong and vibrant independent public service broadcasting whilst adapting it to the requirements of the digital age” and “define an appropriate legal, institutional and financial framework for the functioning of public service broadcasting as well as its adaptation and modernisation to suit the needs of the audience and the requirements of the digital era.”

We begin this chapter by noting that these warnings have been heeded, at least at the official European level. The Council of Europe Committee of Ministers had already in 2003 adopted Recommendation Rec (2003) 9 on Measures to Promote the Democratic and Social Contribution of Digital Broadcasting (Council of Europe, Committee of Ministers, 2003), in which it called on Member States to “reaffirm the remit of public service broadcasting, adapting if necessary its means to the new digital environment [...] while establishing the financial, technical and other conditions that will enable it to fulfil that remit as well as possible.”

However, the Committee of Ministers responded directly to the recommendation of the Parliamentary Assembly in 2007 by adopting Recommendation CM/Rec (2007)3 on the Remit of Public Service Media in the Information Society (Council of Europe, Committee of Ministers, 2007a), with the clear intention of putting a European seal of approval on a new approach to delivering public service via the electronic media. We will return to what the Recommendation says later in this chapter. Here let us note a recital from the preamble of the text: “Convinced therefore that the public service remit is all the more relevant in the information society and that it can be discharged by public service organisations via diverse platforms and an offer of various services, resulting in

the emergence of *public service media*, which, for the purpose of this recommendation, does not include print media” [emphasis added—K.J.].

Thus the Council of Europe took the historic step of giving a new name—Public Service *Media* (PSM) instead of Public Service *Broadcasting* (PSB)—to what the Parliamentary Assembly had called “one of the key socio-political and media institutions developed by Western European democracies in the 20th century.” This act signaled that the whole concept had to be fundamentally rethought if public service provision via the electronic media was to be adapted to the new circumstances. The difference between the two terms is that while traditionally public service provision has relied on radiodiffusion technology (broadcasting), today it is branching out to encompass many more delivery platforms and so needs to be called something other than “broadcasting.” Hence the new technologically neutral term “Public Service Media.” Below we will use one or the other term—depending on the context—to refer either to the old or new concept of public service provision. This does not apply to quotations where the original terminology is retained.

The European Commission’s approach to this issue has been explained by Commissioner Viviane Reding (2006). Noting that “convergence implies also new issues for public service broadcasting” and that “the most important question is to which extent the public service remit may include other services than traditional broadcasting services so that public service content is available on all platforms,” Commissioner Reding stated:

“In fact, it has been clear for us that public service broadcasters should be able to benefit from the possibilities offered by technological developments [...] to comply with their public service remit and to satisfy their audiences. In this respect, online services such as video streaming or programming information appear as a continuation—in the digital environment—of the services traditionally offered by public service broadcasters in the linear (broadcasting) world. [Already the 2001 Communication on the application of State aid rules to public service broadcasting] recognised the possibility for the public service remit to include online services provided that they address the ‘same democratic, social and cultural needs of the society in question.’ [...] Accordingly, public service broadcasters are, *in principle*,

free to develop other activities than traditional broadcasting and make available sociably valuable content on other platforms. The Commission does not question such activities by public service broadcasters; however the scope and financing of such activities should be clearly defined by the Member States [emphasis added—K.J.]”

Interestingly, the draft Audiovisual Media Service Without Frontiers Directive also includes a recital that reads: “The Resolution concerning public service broadcasting reaffirmed that the fulfilment of *the public service broadcasting’s mission must continue to benefit from technological progress*. The co-existence of private and public audiovisual media service providers is a feature which distinguishes the European audiovisual media market.” [emphasis added—K.J.]

Formally speaking, there was no need to include this recital in the draft directive. However, during the preparatory work on the draft, there was frequent mention of the need to ensure the continued ability of public service broadcasters to deliver their services. For example, during a meeting of the Council of the European Union (Education, Youth and Culture) in 2002, devoted in part to revising the Television Without Frontiers Directive, it was noted that interactive media offered new and interesting possibilities for many more audiovisual services to broad as well as narrow interest groups. This, some feared, would lead to “increased competition for consumers’ time and attention [resulting] in a weakening of television’s traditional role as a mediator of culture and of its ability to attract the viewers.” As a counterbalance to this potential danger, it was pointed out that much importance should be attached “to securing the *raison d’être* of the public service broadcasters and their prominent position in the media landscape.” Among other things, more precise demands should be made on public service broadcasters in respect of their provision of high quality, diverse content. Also, where these broadcasters receive public funding, such funding should be adequate to fulfill their public remit (European Council, 2002). The recital in the Audiovisual Media Service Without Frontiers Directive, which emerged out of the revision process of the Television Without Frontiers Directive, can thus be seen as an expression of these policy concerns.

The Council of Europe Recommendation and the EU approach can perhaps be read as ending—at least on a political level—a long

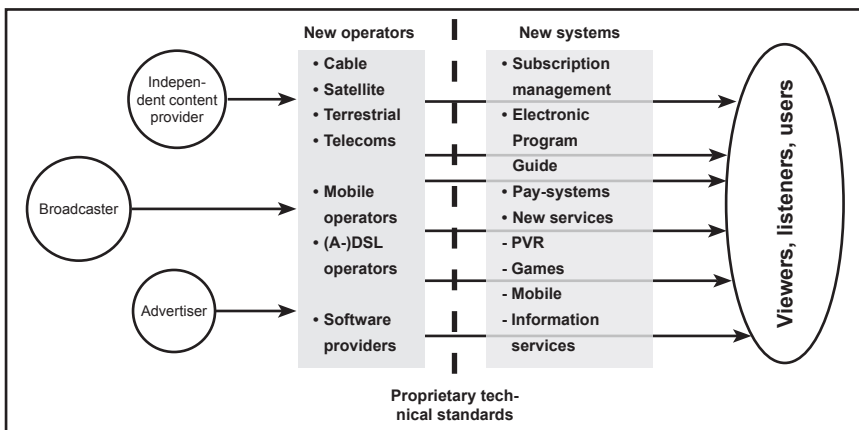
European debate on whether public service broadcasting can and should have a future. The answer is clearly in the affirmative. Nevertheless, the fact that European governments and organizations have said so is not the end but the beginning of the road of securing that future.

10.2. Challenges facing public service media

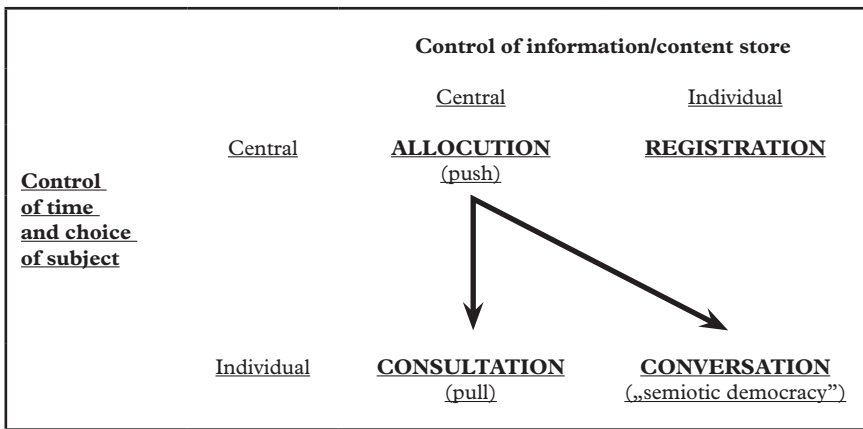
These challenges are numerous. They are technological, ideological, and socio-cultural, and they lead to questioning the very rationale for the continued existence of public service broadcasting. The most important challenge, however, is that of reconfiguring public service media so as to enable them to stay relevant to their audiences and to respond to audiences' needs in ways they will recognize as useful and interesting.

As we will argue below, some of these challenges can be turned into opportunities. Technological challenges are the most obvious ones. What the “digital revolution” means for the overall electronic media landscape is shown in Figure 10.1. It is clear that, as noted by the Council of the European Union, it is multiplying platforms of content delivery and by the same token intensifying competition on the market.

Figure 10.1. The new system of content and service delivery



Source: Nissen, 2006 (after Andreas Weis, ARD).

Figure 10.2. Bordejiwik, van Kaam: Typology of Information Traffic

Adapted from McQuail, 2005, p. 146. —————> – redistribution of information traffic due to new technologies.

However, that is by no means the end of the story. Digitization promotes convergence. The main features of fully developed convergent digital communication, which most likely will be the prevalent (though not the only) mode of communication in the Information Society, include: multimedia communication; interactivity; asynchronous communication; individualization/personalization (customization); disintermediation (elimination of intermediaries, e.g. media organizations, as anyone can offer information and other content to be directly accessed by users and receivers) and “neo-intermediation” (emergence of new intermediaries, especially on the Internet, capable of offering new services or packaging content in new ways).

These features of convergent digital communication are profoundly changing patterns of societal communication, especially mediated communication, as shown in Figure 10.2.

Traditional public service broadcasting has always represented the allocutory model, i.e. “push” technology (linear communication: “take what you are given, when it is available”). With digitalization and convergence, media can combine mass with interpersonal communication, and “pull” technology (non-linear, on-demand, interactive communication and access to multimedia content, i.e., “take what you want, when you want it”) will account for more and more of media

consumption. What we are seeing today is “the mediatization of the Internet and internetization of the mass media” (Fortunati, 2005; see also Henten and Tadayoni, 2002). If it continues, this process will in time take us to the promised land of “Anyone, Anything, Anytime, Anywhere” (when anyone can have access from any place and at any time to everyone else and to all existing content stored in electronic memory). This would revolutionize social communication by undermining the media institutions of today and replacing them with thousands of Internet content providers. By the same token, traditional media institutions, including public service ones, would be gone.

It is hard to predict at this stage whether, and if so, how soon, this could happen. For the time being, it is assumed that linear content delivery will continue in the foreseeable future. If so, PSM has a chance of surviving, though of course much will have to change. If not, however, there would still be a need for public service content in an environment of non-linear media only, but the production and distribution of such content would have to be organized in a different way.

As mentioned before, the challenges facing public service media are not just technological. The very rationale for their continued existence is questioned. Social change since the 1920s, when PSB was first created, has been so extensive and profound that “adaptation to the digital environment” is only part of the program of change that PSB must undergo. It must also be adapted to a new social, cultural, and ideological/axiological environment. This is what the Parliamentary Assembly (2004a) meant when it said in its report: “A debate about public service broadcasting (PSB) is in reality a debate about the philosophical, ideological and cultural underpinnings of society and about the role of the State and the public sector in meeting the needs of individuals and society as a whole. This, rather than technological developments, may be the decisive factor in determining the future of PSB” (Council of Europe, Parliamentary Assembly, 2004a).

The original paternalistic intent behind the creation of PSB lost its relevance long ago. The later social-democratic concern for the “communication welfare” of every citizen, characteristic of the public service orientation of media policy up until the 1980s (van Cuilenburg and McQuail, 2003) retains some validity, but can by itself no longer serve as a sufficiently convincing rationale for the continued existence of public service provision via the electronic media.

Despite the recent developments at the Council of Europe and the European Union mentioned above, there are still strong currents of opinion that there is no longer any real need for PSM. Here we can speak of ideological challenges to PSM.

One of them is a neoliberal approach. “Neoliberalism” refers to the economic, political, and cultural practices that give primacy to the market order where profit and consumption are the defining factors of reality—a reality where corporate greed is given primacy over collective good (Gounari, 2006). It is based on the view is that the proper mechanism for the satisfaction of individual and social needs is the market where required goods or services can be purchased. The law of supply and demand, together with the profit motive, will ensure provision of these goods and services. Accordingly, state or public sector involvement in meeting these needs is unnecessary and unwelcome. This, when taken to its extreme, is a recipe for the elimination of PSB/PSM.

Another approach is that the market should indeed predominate, but since it does not meet every need, there is room for the public sector to supplement what the market has to offer. According to this market-failure rationale for PSM, what is needed is “pure PSB” as a niche broadcaster, offering only broadcast content and services that private broadcasters find commercially unrewarding. This line of reasoning is represented by the commercial sector, which, for competitive reasons of its own, is pursuing a number of strategies to limit the harm to its interests caused by the operation of PSM organizations:

1. An “arrested PSB evolution” strategy (ultimately leading to the marginalization and obsolescence of PSB, culminating in its disappearance), comprising:

- a. A “semantic” strategy, arguing that public service broadcasting should remain precisely that, broadcasting, and PSB organizations should not be allowed to move into the new technologies (seen by commercial broadcasters as their next frontier and growth area, where they would like to see as little competition as possible);
- b. A “clear and precise definition of the remit” strategy, designed to obtain a detailed legal definition of PSB in its traditional form (generalist, universally accessible broadcast channels) which could then be used to block any change of the remit and means

of delivering it (e.g. move into thematic channels, use of new technologies which may not be immediately accessible to all, and would in any case be used only by a part of the audience);

2. A “harmless PSB” strategy, comprising:
 - a. Demands that PSB be reduced to redressing market failure by providing programming commercial broadcasters find unattractive, and thus turn into a niche broadcaster;
 - b. Demands that PSB be prevented from running advertising;
 - c. Demands that production of “PSB content” be financed by a special fund and commissioned from all comers, so PSB organizations do not monopolize funds or production capacity;
3. And a “PSB no longer needed” strategy, following on from the previous one, based on the argument that so much “PSB content” can be found in the programming of commercial broadcasters, or is/can be produced by others, that PSB organizations as such are no longer necessary for the audience to have access to it.

That these strategies are being pursued quite aggressively is shown by the approximately 30 complaints lodged with the European Commission by the private sector (Mortensen, 2005, 2006; Ward, 2002, 2003), questioning any new development in PSB, whether in terms of program profiles of particular services or of technology, going beyond the 1960s model of “one-size-fits-all” traditional generalist channels addressed to the entire population of a country. This, then, is clearly an attrition war on PSB/PSM, seeking to marginalize it. This could ultimately lead to the elimination of PSB/PSM, first as a force to reckon with on the broadcasting scene, but eventually as a sector of the media in its own right. Simply put, public service broadcasters, prevented from branching out into the new technologies, and confined to a narrow range of content, would over time become so technologically outdated and so out of touch with their public that there would be no further need for them.

This kind of approach also finds expression in the policies of some governments. They behave as if swayed by the view that PSB/PSM is an anomaly on the broadcasting scene that needs to be boxed in with legislation. They impose remits and accountability systems to make it justify its continued existence (Jakubowicz, 2003a; 2003b). Another

manifestation of this approach is the EU policy of viewing PSM primarily as a matter of competition policy, with little concern for its intrinsic values and contribution to society (Jakubowicz, 2004).

There is, however, yet another challenge to PSM that can be called socio-cultural. It arises out of societal and axiological change that has also affected the general public's approach to this institution. It can lead either to questioning the need for PSB or to an expectation of fundamental change in its relations with the public.

To begin with the first strand, Van den Bulck (2001, p. 54) has called PSB, when it was created, "a typical modernist project of the cultural elite." PSB in general is rooted in the Modern Project, and thus in the Age of Enlightenment, which saw the intellectual maturation of the humanist belief in reason as the supreme guiding principle in the affairs of humankind. The belief was that the "truth" thus revealed could be applied in the political and social spheres to "correct" problems and "improve" the political and social condition of humankind, and thus create a new and better society. At the root of this thinking is the belief in the perfectibility of humankind. These could be described as the philosophical underpinnings of the concept of public service broadcasting and its Reithian ethos.

Today, we live in a time of post-modernity. As noted by Bauman (2000), post-modernity has many discontents, not least its "liquidity," in which nothing is certain. Clearly, then, the old certainties and clarity of vision regarding the role of PSB as a paternalistic organization, aspiring to a normative role in social life and to the enlightenment of the uneducated majority, are gone. Nothing equally convincing (and comforting, as far as the sense of mission and self-definition of PSB broadcasters themselves is concerned) has replaced that concept. It is no wonder that the "PSB remit" is the subject of so much heated debate today, and the concept still eludes clear definition.

Moreover, as noted by Blumler (1998), ideological and cultural change unfolding in developed societies has involved individualization, consumerism, privatization, and anti-authoritarianism. This may reinforce impatience with the normative role of PSB and its aspiration to represent, but also perhaps to define, the public interest.

In addition, the original model of PSB was based on unequal, asymmetrical relations between the audience on the one hand, and broadcasters, cultural elite and the state on the other (Scannell, 1989,

pp. 163–164). Scannell argues further that PSB, despite its “fundamentally democratic thrust” (in that it made available to all virtually the whole spectrum of public life and extended the universe of discourse, and was originally designed to introduce social equality in access to information and all other content), has been a system of representative communicative democracy, where power accrued “to the representatives, not those whom they represent.” That was legitimated by social divisions and stratification at the time. Since then, the leveling of living and educational standards as well as democratization have led to the rejection of such asymmetrical relations. Scannell’s comment—“The sense that the BBC is part of the world of ‘them’ rather than ‘us’—a world that is somewhere else than where listeners and viewers are—has persisted until this day” (Scannell, 1996, p. 27)—can apply to many other PSB organizations as well. This aspect of the socio-cultural process may thus contribute to questioning the rationale for PSB.

In the second of its dimensions, the socio-cultural process calls instead for a far-reaching change in relations between the PSM organizations and their public. This is due to developments in social communication resulting from its evolution away from “allocution” and towards “conversation.” The well-known phenomenon of Web 2.0 is based on an implicit “architecture of participation,” a built-in ethic of cooperation, in which the service acts primarily as an intelligent broker, connecting the edges to each other and harnessing the power of the users themselves.¹ All this, says Stark,² amounts to a revolution based on a simple concept: Semiotic democracy, or the ability of users to produce and disseminate new creations and to take part in public cultural discourse. Users are by and large developing and posting their own original creations. Anyone can now become a creator, a publisher, or an author via this new form of cultural discourse, a platform to publish to the world at large that grants near-instant publication and access. What is emerging is “a digital commons,” also known by other names, e.g. “information commons” (Kranich, 2004). Hence the explosion of user- or community-generated content, or user-created content (Wunsch-Vincent and Vickery, 2007).

This phenomenon provides a twist on the commercial sector’s “PSB no longer needed” argument. It is pointed out that a great deal of socially useful and high-quality content is now provided by government services, educational institutions, cultural institutions, and

various groups and communities. Moreover, it is argued (Chitty, 2007, p. 28) that there is “a thriving creative community of independent production companies, interactive writers and digital artists, web-enabled public organisations and design agencies” and that they now “employ more people than the broadcast TV sector.” The implication, therefore, is that PSM is being replaced, if not wholly then at least partly, by other sources of socially valuable and high-quality content, especially in the online environment.

The nature of this new stage in the evolution of mediated social communication is summed up by Küng’s (2002) comparison of old and new media content.

Table 10.1. “Old” and “new” assumptions about the nature and strategic significance of content

Characteristic	“Old” Media Content	“New” Media Content
Core customer proposition	Information, education, entertainment	Synthesis of information, communication and service
Basic communication paradigm	One-to-many, mass	Two-way, personalized, interactive, on-demand
Relationship between content and technology	Message not medium	Message and medium
What is quality?	“Quality” content fulfils exalted goals and has intellectual and artistic merits	Quality content keeps users on the site and is constantly refreshed and updated
Who produces content?	Experts dictate · Content-generation relies on artistic expertise and discriminating minds	Customer in the driving seat · Decides what, when, and in which form · The end of “journalist knows best” · Successful content often generated by users
Relationship with commercial elements	Content and commerce strictly separated and clearly labeled	Content and commerce inextricably linked
Structure	Linear, narrative, on or off, pre-selected or packaged, fixed schedule	Molecular orientated around 3-D hierarchical matrix

Source: Adapted from Küng, 2002.

If it is true that the customer is (or will increasingly be) in the driver's seat and that we are seeing the end of "journalist knows best," then if PSM does not want to be laid to rest, it must completely redesign its relationships with what used to be regarded as an "audience" and may now need to be defined as a community of users and contributors.

For all the above reasons, change must encompass practically every area of PSM activity. What will, however, be decisive is a new understanding of public service media's approach to, and relationship with, the public.

10.3. Facing the challenges

10.3.1. Is there continued need for PSB/PSM?

It is often argued that since commercial media and the new technologies are offering unlimited choice, there is no longer any need for the delivery of public service programming. The Council of Europe responds to this argument in its recommendation by noting that "growing competition in broadcasting makes it more difficult for many commercial broadcasters to maintain the public value of their programming, especially in their free-to-air services." A similar concern, as we have seen, has also been voiced within the EU. The Council of Europe also noted that "globalisation and international integration, as well as the growing horizontal and vertical concentration of privately-owned media at the national and international levels, have far-reaching effects for states and their media systems" (Council of Europe, Committee of Ministers, 2007a).

The British regulatory authority Ofcom (2004, p. 33) has also noted that after the completion of the digital switchover, there will be a period of "declining PSB obligations" for what are known in the United Kingdom as "commercial public service broadcasters," as they will no longer be able to afford financing "challenging PSB programming."

Thus growing competition on the audiovisual market is a challenge that can be turned into an opportunity for PSM. If, because of growing competition, commercial media—in order to maximize their advertising potential—reduce high-quality and demanding programming, then the need for PSM will grow. This would be all the more true if Norris and Pauling (2005) are right that two key elements of

PSM, but also commercial media so far, may in the future be threatened in the commercial sector:

- free-to-air programming, as more and more attractive content is offered via subscription-based or on-demand services;
- local, domestically produced content, due to the globalization of television and the inability of local television, especially in smaller countries, to compete with international channels (though let us note that the European quota system will partly counteract this threat in EU countries).

Any changes in the television offer complying with this forecast will certainly argue in favor of retaining and developing PSM, as the last mainstay of both free-to-air programming and local content.

In addition, Norris and Pauling (2005) sum up the impact of the digital age on the principles of public broadcasting:

- Digital is dominated by pay: The vision of digitopia is a vision of a subscriber-based world, where viewers pay for their programming, with contrast to the public broadcasting principle that programming is universally available and free to all at the point of use;
- Range and balance may not be achieved: There can be no guarantee that subscription channels will provide a full range of programming across all genres and subgenres.
- Digital is dominated by global forces: the most successful pay channels are transnational or global. In most English-language countries outside the United States, the majority of pay channels will be American;
- The pay TV and global environment does not meet the cultural requirements of public broadcasting;
- Pay TV does not meet the democratic requirements of public broadcasting. It will not provide news, information, and opinion for the domestic audience. Most importantly, it cannot provide the public space for public discourse;
- People in multi-channel homes with more choice are watching fewer “highbrow” programs than their counterparts in analog homes—programs in news, current affairs, other nonfiction, and the arts.

Therefore, the authors say, the inevitable conclusion is that the requirements of public broadcasting in the digital age must continue to

be met by the free-to-air broadcasters or new forms of content suppliers, as the pay TV or on-demand environment is clearly inadequate.

The challenge to public broadcasters must be to maintain their audiences and their impact. There is also the question of how to safeguard the public sphere in the era of on-demand. To meet these challenges may require new approaches to both content and audiences.

10.3.2. Technology

As shown by the Digital Strategy Group (2002) report, public service broadcasters have long known that the traditional model of public service delivered solely via broadcasting is no longer tenable. BBC Director-General Mark Thompson made this very clear when he said that the BBC should no longer think of itself as a broadcaster of TV and radio and some new media on the side. “We should,” he said, “aim to deliver public service content to our audiences *in whatever media and on whatever device makes sense for them, whether they are at home or on the move*. We can deliver much more public value when we think *across all platforms* and consider how audiences can find our best content, content that’s more relevant, more useful and more valuable to them... This new digital world is a better world for public service content than the old one” (BBC, 2006; emphasis added).

The Council of Europe and EU documents cited earlier might suggest that political resistance to the extension of PSM to new platforms has now been overcome. This is certainly true as far as the Council of Europe is concerned. In the words of the already cited Recommendation (Council of Europe, Committee of Ministers, 2007a), the public service remit “should be performed with the use of state-of-the-art technology appropriate for the purpose.” On the other hand, it remains to be seen how the issue will be treated by the European Commission’s Competition DG. As Moe (2006) showed for the example of the Commission’s handling of complaints against online activities by British, German and Norwegian PSM organizations, in the past, it has had a very restrictive approach to such services. It sought to assign public broadcasters a supplementary role in the online environment. It expected PSM online services to be notably different from existing commercial ones and not to compete with them, nor undermine their market position or potential. Finally, it thought

they should only accompany or support broadcast programs and not constitute an autonomous service, designed to serve Internet users in the same way as broadcast programs serve the audience. Other arguments used by the Competition DG with regard to online activities of PSM organizations have been that these services do not differ from similar commercial products; they are offered by other commercial operators; they are provided for remuneration; they address the individual needs of the specific user; they are Information Society services, not broadcasting; they are offered on individual demand; and they do not address the democratic, social and cultural needs of society (Mortensen, 2006).

For these reasons we have emphasized the words “in principle” in the statement of Commissioner Reding (2006) cited above (“public service broadcasters are, *in principle*, free to develop other activities than traditional broadcasting and make available sociably valuable content on other platforms”). It remains to be seen what this means in practice and whether there will not be further European Commission objections to free use of other platforms by PSM organizations in Member States.

In any case, it is already clear, from what we have said so far, that PSM should go the way suggested by Wiio (2004) and offer three types and levels of services:

- Traditional linear program services for the general public. These services will likely remain the core of public service television services in the foreseeable future. The services for large audiences can include program-specific interactivity or items whose reception calls for active involvement by the recipient.
- Linear (“thematic”) services targeted at special audiences. The level of interactivity of services for special audiences ought to be higher than it is in the case of services targeted at the general public. As their name would suggest, the audiences gained by these channels are smaller than the audiences for the traditional basic channels.
- Personal services, performing what is known as “personalized public service.” Central to these services is strong interactivity. These personalized public services can be program-linked, or program-independent, providing value-added services. Some examples of program-linked services are provided in Table 2.

Table 10.2. Extending public service TV and radio with new media

Public service task	TV & Radio	Extending with New Media (examples)
Inform the public of events of significance to their daily lives	• Broadcast extra news programs	• Alert-services on mobile phones (text, image) • Providing extra information (on demand)
Encourage participation in public debate	• Invite listeners and viewers to take part in TV and radio programs	• WEB and SMS-services as an integral part of TV-programs (e.g. voting and comments) • Provide forums and 'communities' on web sites
Provide "value for money" by moving towards the <i>"Anything, Anytime, Anywhere"</i> paradigm	• Re-running radio and TV programs	• EPG and metadata to make time-shift easier on PVRs • Provide archive material on-demand via the Internet • Streaming radio (and later TV) • TV and radio on handheld devices, e.g. news and sports
Provide quality entertainment	• Entertainment shows	• Online games on the web • Interaction with entertainment shows
Educate	• Educational broadcasts	• Offer archive materials of educational value and interactive applications (with individual options)

Source: Nissen, 2006.

There are, however, also other examples of the creative use of new technologies by public service broadcasters. The BBC allows audiences to create personal radio stations from its content. The service called MyBBCRadio uses a BBC iPlayer that combines existing online radio services, along with radio on demand, to allow the audience greater flexibility and choice over when it can view or listen to shows.

Another example is provided by podcasting, offered by both public and commercial broadcasters, especially for news and interview shows. Indeed, as Tambini (2006, p. 116) has pointed out, "radio is far ahead of television in terms of the development of on-demand online services."

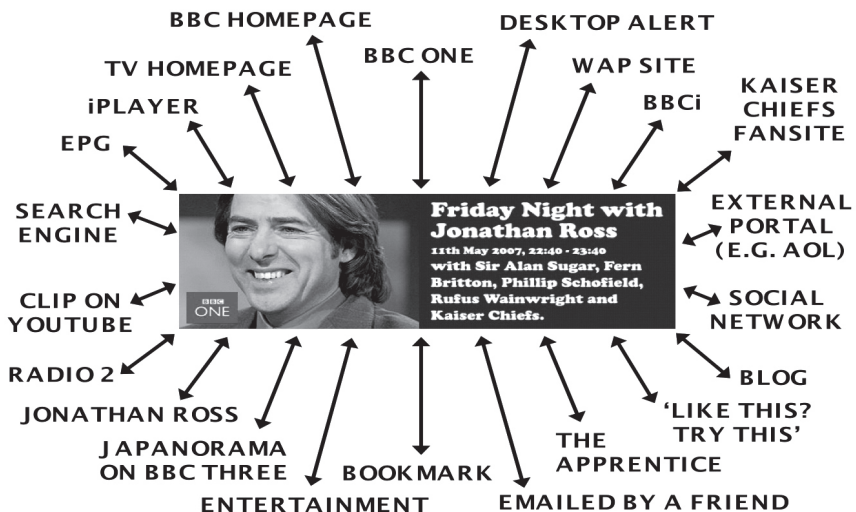
In Australia it has been announced that once digital radio is launched, listeners may be able to download music tracks from radio stations, buying tracks in real time over special mobile phone

handsets. Generally speaking, such technologies offer an opportunity to transform the relationship with audiences and to promote greater interaction between audiences and programs before, during, and after transmission. Speaking of the BBC's plans in this regard, Nelson and Friend (2007) note that BBC content should be seeded across the Internet and as many platforms as possible. "We must seed content where audiences hang out, e.g. Facebook and MySpace, and let BBC content be embedded across the web," they note. Audiences are no longer passive recipients but are taking advantage of increasing opportunities for interactivity and a two-way relationship with broadcasters. "This interactivity," they point out, "is central to the development of BBC Web 2.0."

Figure 10.3 illustrates the opportunities offered by digital technology for achieving the kind of relationship with audience the BBC wants to achieve, so that the audience can:

- Find content (Discover, Access),
- Play with it (Engage, Explore), and
- Share it with others (Participate, Create).

*Figure 10.3. Find, Play and Share on the example of
"Friday Night with Jonathan Ross"*



Source: Nelson, Friend, 2007.

All this raises important issues concerning the fundamental features of PSB as traditionally understood. The use of thematic services, and even more so of personalized ones, can be seen as undercutting what has always been regarded as a distinguishing element of PSB, namely, universality of content and access.

Universality in this sense was a requirement of the early phase of PSB development, a time of “an economy of scarcity” in broadcasting, when universal service provision via the PSB was the only appropriate solution. Today, audiences are signaling by their user behavior that in addition to generalist services, they also want more and more thematic and personalized/individualized content. This is why, in its 2002 report “Media with a Purpose: Public Service Broadcasting in the Digital Era,” the EBU’s Digital Strategy Group called for a redefinition of basic concepts relating to public service broadcasting, including universality of access and content.

Universality of content can no longer be understood as one-size-fits-all programming on one or more broadcast channels, but as both universality of basic supply on generalist channels (including mass-appeal, entertainment programming), which will be central to what public service broadcasters offer to the public, and universality across the full portfolio of services, some of them specialized or tailored for specific audiences, adding up to a more extended and comprehensive range of services.

Universality of access can no longer be understood as a couple of terrestrial channels available to the entire population, but as presence on all relevant media and platforms with significant penetration, as well as the ability to deliver a “personalized public service” in the “pull,” online and on-demand environment (see Digital Strategy Group, 2002). The question, of course, is what is meant by “relevant media platforms”? “Relevance” should no longer be tied to the ability to perform a universal service or to the size of the audience. Instead it should be tied to the ability to perform the service needed by the audience, in ways the audience expects to be served.

10.3.3. Redefining the remit

In its Recommendation, the Council of Europe called on Member States to “maintain the key elements underpinning the traditional public service remit, while adjusting it to new circumstances.” The Council

states, with reference to its many documents on the subject, that PSM should serve as:

- a) a reference point for all members of the public, offering universal access;
- b) a factor for social cohesion and integration of all individuals, groups, and communities;
- c) a source of impartial and independent information and comment, and of innovative and varied content that complies with high ethical and quality standards;
- d) a forum for pluralistic public discussion and a means of promoting broader democratic participation of individuals;
- e) an active contributor to audiovisual creation and production and greater appreciation and dissemination of the diversity of national and European cultural heritage (Council of Europe, Committee of Ministers, 2003)

This last point is underscored also by Hujanen (2002), who believes that in order to survive in the digital media environment, PSM must retain—and indeed concentrate on—its role as a content producer and provider.

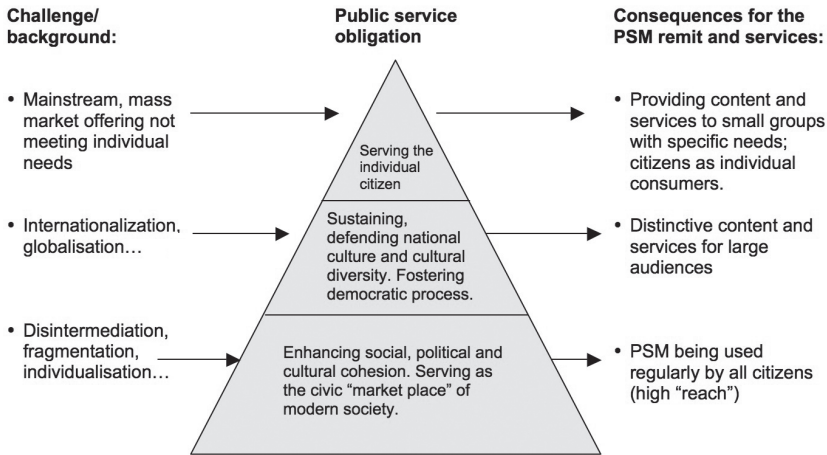
While there are many new elements in the Council of Europe approach, full “adjustment to new circumstances” requires more far-reaching changes. As shown by Nissen (2006), the traditional PSB remit is challenged by the following trends:

- traditional mainstream PSB programming for a mass audience fails to meet the individual needs of the audience;
- internationalization and globalization require a response in PSM programming;
- disintermediation, fragmentation, and individualization of society and audience needs and interests must also be taken into consideration when designing the PSM program offer.

Nissen has therefore offered the following view of how the remit should be adjusted to these circumstances.

This figure confirms what we have said about the use of technology (general, thematic, and personalized services) and points to the

Figure 10.4. PSM obligations—their background and consequences



Source: Nissen, 2006, p. 21.

functions that PSM should perform. To continue this line of thinking, let us look in more detail at particular areas of the programming obligations of PSM organizations. It seems clear that while the traditional remit remains valid, the new situation also requires that PSM organizations undertake new tasks.

When we consider the tasks of PSM in relation to political citizenship and democracy, we must remember that with globalization and international integration, the political process no longer happens only at the national level (for a more extensive discussion of globalization, democracy, and the public sphere, see Jakubowicz, 2005). Therefore, public service media have additional obligations to their audiences, if the audiences are to be capable of following events at the international level and form an opinion on policies that their representatives are involved in developing in international organizations. At a minimum, these obligations are:

1. Inform citizens of the work of international organizations;
2. Contribute to creating a public sphere and elements of a civil society at the regional, continental, and global levels;
3. Serve as a watchdog of international and global organizations;

4. Develop social capital and a sense of community and co-responsibility for the nation-state at a time when cyberspace allows individuals to participate in virtual communities and become detached from their own societies and nations.

The cultural obligations of PSM are also fundamentally affected both by the process of globalization and international integration and by the increasingly multicultural and multi-ethnic composition of particular societies (for more on this, see Jakubowicz, 2006a). Therefore, to be relevant in this situation, PSM should undertake new tasks, including:

1. Serving minorities and immigrant communities in a way that satisfies their cultural and linguistic needs, but does not prevent their integration with the rest of the population;
2. Creating a sense of affinity and understanding with the people of other countries in the region, especially if the country in question is involved in some international integration scheme;
3. Promoting intercultural and inter-religious dialogue at home and internationally;
4. Promoting acceptance of, and respect for, cultural diversity, while at the same time introducing the audience to the cultures of other peoples around the world;
5. Striving to prevent, or reduce, the digital divide, so that no one is prevented from access to culture via the new technologies.

Another field in need of re-examination is the educational tasks of PSM. New skills are needed in new social, economic, cultural, and technological circumstances. The European Commission (2005f) has proposed the following list of key competences for lifelong learning: communication in the mother tongue; communication in foreign languages; mathematical competence and basic competences in science and technology; digital competence; learning to learn; interpersonal, intercultural, and social competences and civic competence; entrepreneurship; and cultural expression. Tapio Varis (2005), for his part, has proposed a different list of “new literacies”:

- Technology Literacy: The ability to use new media such as the Internet to access and communicate information effectively;

- Information Literacy: The ability to gather, organize, and evaluate information, and to form valid opinions based on the results;
- Media Creativity: The growing capacity of citizens everywhere to produce and distribute content to audiences of all sizes;
- Global Literacy: Understanding the interdependence among people and nations and having the ability to interact and collaborate successfully across cultures;
- Literacy with Responsibility: The competence to consider the social consequences of media from the standpoint of safety, privacy, and other issues.

Accordingly, PSM should reorient their educational role in order to:

1. Contribute to life-long learning systems;
2. Contribute to *e-learning*;
3. Adjust educational content to the requirements of the 21st century.

While promotion of social cohesion and national integration have always been a primary task of public service broadcasting, today the issue has a new and important dimension in the form of the digital divide and digital exclusion. Public service media should, therefore, be at the forefront of the digital switchover (Iosifides, 2007, p. 17, confirms that they play a “pivotal role in accelerating the take-up of digital services”). They should contribute to the promotion of digital inclusion by being available and offering attractive content on all relevant platforms and:

1. developing strong and recognizable program and institutional brands, serving as a beacon for people among the multitude of new content providers;
2. being available on all digital platforms, and thus attracting people to gain access to them;
3. supporting traditional broadcasting content with Internet and interactive resources;
4. providing multimedia interactive services, independent and complementary Web services;

5. serving as a trusted third party, a reliable and trustworthy guide to content in the online world;
6. actively promoting digital media literacy and awareness of the tools of the information society, in particular the use of the Internet;
7. providing content in local and minority languages in order to encourage minorities to use the tools of the information society, as well as for groups neglected by commercial content providers;
8. promoting open standards in API, CA/CI, etc.

Finally, PSM organizations should think of themselves not just as media, but as full-fledged cultural industries (Hesmondhalgh, 2005), capable of operating on the audiovisual market and contributing to its development. Their tasks as cultural industries include the following:

1. Promote domestic audiovisual production by maintaining a high share of original domestic works in air time;
2. Make optimal use of audiovisual archives by launching new channels—alone or in collaboration with other partners, as well as other program and content services, e.g. VOD (see Tambini, 2006);
3. Promote the growth of the program industry by:
 - a) Commissioning production of radio, television, and Internet content from independent producers;
 - b) Establishing terms of trade with independent producers so that they can retain some rights and exploit them to gain an additional revenue stream, enabling them to develop their production facilities and finance new production;
4. Promote the development of audiovisual culture and production in the country as a whole by:
 - a) Maintaining local or regional stations or production centers;
 - b) Commissioning production from independent producers throughout the country;
5. Continuous training of staff;
6. Financing research and development to promote technological progress in broadcasting and multimedia;
7. Active involvement in all elements of the digital switchover;

8. Development of revenue streams from market activities (other than selling advertising time) in order to reduce dependence on license fee revenue and to avoid or minimize the need to raise the fee;
9. Cooperation with private companies, but without putting non-commercial program goals at risk;
10. Respect for the rules of competition and fair trading, as well as state aid regulations;
11. Providing value for money, high economic effectiveness and careful use of public funds.

10.3.4. Public service content without public service institutions?

We have seen that the “PSB no longer needed” strategy of the commercial sector is based on the argument that so much “PSB content” can be found in the programming of commercial broadcasters, or is/ can be produced by others, that PSB organizations as such are no longer necessary for the audience to have access to it. Proponents of this view propose a system of “contestable funding,” whereby anyone can compete for such funding in order to produce and broadcast or otherwise distribute high-quality “PSM content.”

There are a few isolated cases of such situations. In Navarra, Spain, the authorities of the small autonomous community cannot, unlike those of the bigger ones, establish their own regional public service broadcasters. So instead they organize public tenders to promote local audiovisual production, so that regional and local radio and television stations offer public service content (Mora-Figueroa, 2007). Of course, the inhabitants of Navarra can receive the programming of the national Spanish public service broadcaster, RTVE.

Despite this experience, the idea is kept very much alive (see e.g. Giles, 2006), taking the form of proposals either to dismantle PSM altogether, or to retain PSM institutions, but deprive them of any security or guarantee of survival, by forcing them to compete for money and the right to exist (with the possibility that if they lose the competition, they will disappear).

It is hard to see, however, how any of these solutions could serve to implement the many vital functions of PSM listed above. In fact, the

ability of the BBC to take the lead in developing a new concept of what PSM should be about in the 21st century (BBC, 2004, p. 2006), and in using the new technologies to deliver its public service content, derives in large measure from its size, capacity, and funding as an institution able to think strategically and long-term. It was also the BBC that took the lead in the introduction of digital terrestrial television, after the debacle of ITV Digital, a commercial company.

Philip Schlesinger (2004, *passim*) is not in doubt about the need to preserve PSM institutions as such. He makes these points:

“There are some strong arguments for taking broadcasting institutions seriously. For instance, they constitute and sustain creative clusters. They socialize personnel and may allow some space for thinking beyond the next project. Critical mass in institutional terms may allow resistance to external pressures. Public funding in particular allows the scope for the pursuit of goals that are not totally subordinate to market logic.”

A different set of issues concerning the institutional framework of PSM arises in the context of technological change and digitalization. As noted by the Digital Strategy Group (2002), with new program content, new production infrastructure, new workflows, and a different environment, public broadcasters must also re-evaluate their organizational structures and consider changes. Public service broadcasters need to reorganize themselves to suit the emerging environment and new ways of working in the production. This includes the growing use of multimedia for accompanying content or separate Web services, the probable migration of PSM radio and television services to a greater plurality of channel offers, and the convergence of the media in general.

Digitalization makes possible the use of a “functional or multimedia orientated structure.” This is better suited in times of digital and multimedia production. The company is arranged in relatively autonomous parts (combining radio, television, and multimedia) for each of the main functions, or divisions in the operation: channel controlling, program production, support, and internal services. Program production itself is not separated according to channels or media, but

according to program genres. The advantages of this structure include the synergies of resources and talent for program production, cross-fertilization of ideas, and greater scope for cross-departmental usage of program content that is carried by several channels or services and across multiple delivery platforms to a variety of new combined receivers for different user situations.

All this shows that the predominant view is that PSM institutions should stay in one form or another, and only the most extreme views support their dismantling. No system of contestable funding could ensure the benefits of properly functioning PSM organizations or take on all the programming duties outlined above. As long as PSM provides linear on-air programs, these must be backed up by institutions capable of discharging their many obligations.

Another twist on the institutional front is to say that with changing modes of content delivery, new institutions are needed to supplement the old ones. Ofcom (2007, p. 17) is suggesting that with the advance of new digital technologies, new institutional solutions should be devised:

“The rapid growth of broader, richer, less sharply defined digital media suggests that in the medium term—if not sooner—the broadcasting market will be increasingly characterized by forms of provision that are *cross-platform and multimedia in nature*, where content is likely to become increasingly central. Content producers will be able to make their output available *without using the traditional channel model*. From a public service perspective, it may now be more appropriate to speak of Public Service Content (PSC) rather than Public Service Broadcasting (PSB).” [emphases added—K.J.]

On this basis, Ofcom has suggested that since production and delivery of online public service content, in cooperation with many content producers and providers, require different working methods than are typical of broadcasting organizations, new, appropriately designed institutions should be created. This is why it is proposing the establishment of a Public Service Publisher, to be responsible primarily for online public service content. Ofcom (2007, pp. 7–8) had this to say concerning the operating model of PSP:

- First, the PSP could be a commissioner—rather than a producer—of participative content. It could work with a diverse range of suppliers, from traditional linear content producers to others rooted in alternative markets such as gaming and social networks;
- Second, a more radical rights model could be designed specifically for an organization delivering public purposes in new ways. Overall, the PSP should be “share-aware”—meaning that the rights exploitation model should embrace the reality of a participatory media environment, and not struggle against it. In particular, this means that alternative open licensing models—which allow content to be re-used and modified by others—are likely to be more appropriate for the PSP than traditional rights models;
- Third, the PSP would operate a non-commercial business model, although the open rights model could allow other parties to develop commercial propositions that build on PSP content and services. In the case of the PSP, if commercial propositions were developed in response to PSP-funded content, a share of commercial income should be returned to the PSP and the content producer;
- Fourth, the PSP could aim to secure reach and impact by partnering with other organizations for distribution. Possible partners include traditional broadcasters, local TV and community media, alternative platform operators, and service providers. The core remit of PSP would be to ensure the delivery of new forms of public service content, and it should therefore work with other organizations with established distribution arrangements, rather than create distribution networks of its own.

The British government never warmed to the idea, and Ofcom finally gave up on this model,⁴ but in doing so pointed out that developments in British broadcasting had actually validated the idea. Commercial terrestrial television stations (Channel 4, ITV, and Five, all considered “commercial public service broadcasters” in the British system, and obliged by their licences to perform a public service) were reducing their public service content. As a result, the BBC was increasingly alone in delivering public service value and would be left without competition necessary to prevent it from becoming complacent and without an incentive to improve its offerings.

10.3.5. PSM and the public: a new partnership

Public service broadcasting has come a long way since its paternalistic beginnings. One thing, however, has remained basically unchanged, and that is the asymmetrical relationship between PSM organizations and their audience.

According to Ytreberg (2002), there are four ideal types of self-presentation of PSB: paternalists, bureaucrats, charismatics, and avant-gardists. Not one of these ideal types assumes anything else than an institution apart, aloof from the audience to which it speaks, and seeking legitimation in terms of the content it delivers to the audience. Not one of these ideal types assumes the renunciation of PSM power or changing the asymmetrical relationship between PSM organizations and the public.

Yet, given all the social change since the 1920s (as described in part above), it seems clear that the relationship has to change. Thomass (2007) points out that since public service broadcasters have to fight for their political survival, the audience acquires an even greater importance than before. In the last analysis, she says, it is the support of the audiences and of the public sphere that legitimizes PSB. An intensified dialogue with the audiences offers the possibility to position PSB better vis-à-vis the audiences, to win supporters, and also to display responsibility and accountability to the license fee payer. She mentions several forms of such dialogue: the nomination of ombudspeople who accept viewer complaints and communicate them to the responsible editors; local and regional media forums; targeted opinion surveys among the audience; and of course, online communication, which opens new ways of dialogue and can promote intensified contact with the audience.

However, other proposals go much further, pointing to the need fundamentally to revise the model of public service provision. John Keane (1991, 1993) long ago called for this to happen, so that public service media would “aim to facilitate a genuine commonwealth of forms of life, tastes, and opinions, to empower a plurality of citizens who are governed neither by despotic states nor by market forces. It would circulate to them a wide variety of opinions” (Keane, 1993, p. 6). This would serve to decommodify and maximize freedom and

equality of communication, and would require—in Keane’s view—massive public intervention into the media system in order to develop a plurality of non-state media and, among other things, to guarantee rights of access to air time for individuals, groups and independent program makers.

This call is repeated today. It is argued that alternative, Internet-based media may become “New Public Media” (see Rozanova, 2007). This also appears to be the view of Ian Kearns (2003): “Social and technological change means facing the challenge of renewal—from public service broadcasting to public service [online] communications [...] the BBC and the entire Public Service Communications community needs to move away from the broadcast paradigm of content delivered to a mass public and toward the usage and participation paradigm of the network age.”

Rozanova (2007, p. 143) does not agree:

“The idea that alternative media may become New Public Media is disturbing in its complacency regarding the vision that public institutions, including the media, may survive only on a small-scale basis, using rudimentary resources, while big production resources and large audiences are colonized by media corporations or governments that are subject to little restraint [...] on a societal level, there is always a need to create a common vocabulary, common frames of reference to facilitate public discussion and public decision-making.”

This takes us into the whole debate on the role of new technologies in the democratic process, i.e. the so-called “teledemocracy,” “digital democracy,” or “e-democracy.” Dahlgren (2003), for example, argues that by facilitating the emergence of multi-sector online public spheres, the Internet is creating disparate islands of political communication and has the effect of dispersing what has been a relatively unified public sphere of the mass media into many separate public spheres. This threatens to undercut a shared public culture and the integrative societal function of the public sphere, hampers the formation of collective political will, and may well foster intolerance among separate “voluntary communities.” This trend towards fragmentation and increasing dispersion may reduce the democratic potential of the ICTs (for a more extensive discussion, see Jakubowicz, 2005).

Rozanova's (2007) point about the need to preserve media capable of representing the public interest, rather than replace them with those capable only of articulating the interests and views of select groups, is well taken. Nevertheless, public service media cannot remain indifferent to the fact that more and more people are using the Internet and other non-broadcast electronic media as their main source of information and content. Therefore, a third way must be sought: use of both broadcast and non-broadcast electronic media for the purposes of public service delivery. Keane's vision can today largely be achieved simply by opening up PSM media to the world of semiotic democracy and encouraging them to keep abreast of trends in societal communication.

This is suggested, for example, by Collins et al. (2001, p. 11), who point to the important role of the PSB broadcasters themselves in safeguarding their own future:

"People should be able to feel that public service broadcasting is theirs. [...] New media, as several public service broadcasters have recognized, provide striking opportunities to break out of [the] 'take what you are given' mode. But organizational changes also offer public service broadcasters to build new relationships of partnership, identification, and sense of shared ownership which involve viewers, listeners and Web surfers—indeed, which make receivers into senders."

Chitty (2007, p. 27) agrees:

"The concept of participation is very amenable to a new idea of Public Service in that it encourages citizens to become users rather than viewers of content: active participants who produce, modify, comment on, judge and repurpose content rather than act as the passive (though grateful) recipients of broadcast information and entertainment. Rather than thinking of high quality 'content' in the manner of TV programmes it might be more useful to think of high quality participatory services where linear content is only one aspect of an experience that might be accessed through many channels—online, via mobile, kiosk or TV."

The main avenue to explore is how to introduce user-generated content (see Madden, 2004⁵ and Wunsch-Vincent and Vickery, 2007, for

descriptions of this fast-growing phenomenon) into the PSM program offer—naturally, without compromising its quality.

During a session at the Financial Times Digital Media Conference on what media consumption in the UK might look like in 2012,⁶ a big rise in the sharing of information among online communities with common interests was predicted. The new technologies will permit far greater personalization of all forms of content, and end users will be empowered and have greater influence, controlling how, where, and at what price they consume content. It was noted that mainstream media should respond to a blogging-related trend, micropublishing, which allows authors not only to control the editorial and publication process but also to determine the fees they charged for access to their work.

This strategy is pursued, for example, by VRT, the Flemish PSM organization in Belgium (Geysen, 2007), which says that its role now is, among other things, to “give the public a platform to create.” Since, says VRT, the “secret ambition of the audience” is to have “15 minutes of fame,” then it is the role of the PSM organization’s “platforms [to] give [them] the opportunity to have their 15 minutes.”

This, however, is a rather dismissive approach to “user-generated content.” Other PSM organizations approach the issue in a different way. BBC News 24 has launched the UK’s first news program based entirely on user-generated content. *Your News* broadcasts stories, features, and videos that have proved most popular with viewers on television and the Internet.

The weekly program includes items such as news stories covering issues raised by members of the public as well as a segment answering questions that have been sent in. The BBC has also adopted rules allowing for payment for user-generated content that is “particularly editorially important or unique.”

In another development, in June 2007 the BBC launched a user-driven website, as part of BBC Two’s Summer of British Film season. The site features inspired tributes to British cinema in the form of amateur film clips and a forum for film lovers to share their ideas and experiences. Budding amateur filmmakers and actors are also invited to remake scenes from their favorite British films and upload them to the BBC mini-movies group on YouTube. The site will showcase the best entries and allow users to comment on and rate their peers’ efforts. The best clips will be shown on BBC Two during the Summer of

British Film season. A similar website established by Channel 4 allows users to generate, upload, and view four-minute documentaries.

All this serves a number of purposes: It allows PSM to acknowledge the role of the public as an active partner, and no longer just passive receiver; to reconnect with the public in ways suited to the 21st century, and to make public media truly public. While practical ways of achieving this goal are still being developed, this can fundamentally democratize PSM and bring it into line with trends in society and social communication. A debate on this is beginning among PSM organizations (Mullane, 2007).

10.4. Conclusion

Several models of the emergence of public service broadcasting can be identified:

1. Paternalistic—as in the United Kingdom, where PSB was originally born in 1926 in the form of the BBC, an independent public corporation with a public service remit, understood in part as promoting public enlightenment, playing a clearly normative role in the country's cultural, moral and political life.
2. Democratic and emancipatory—as in some other Western European countries, where erstwhile state broadcasting organizations began to be transformed into public service broadcasters in the 1960s and 1970s, a time when state (government) control of the then-monopoly broadcasters could no longer be justified or claim legitimacy, and a way was sought to associate them more closely with civil society and turn them into autonomous PSB organizations.
3. Systemic—as in West Germany after World War II; Spain, Portugal, and Greece in the 1970s; and in Central and Eastern Europe after 1989, when a change of the broadcasting system was part and parcel of broader political change, typically transition to democracy after an authoritarian or totalitarian system.

There is thus, historically speaking, a growing association of public service media with democracy and civil society. Now is the time to take

the next step and reconstruct PSM into a platform for open societal communication. This would be a radical departure from the traditional model of paternalistic top-down communication.

This would complete the evolution of PSB, which can be presented as follows:

- 1920–1930s: State radio or paternalistic PSB
- 1960–1980s: Democratic-emancipatory evolution of PSB: closer ties with civil society
- 2000–2015 (projected): PSM and the public: a new partnership

Flisen (2007) has written that the future of PSM organizations will be decided by “economy, technology and ideology.” Of these three, ideology will probably most strongly affect prospects for public service media, or public service provision via the electronic media, surviving in the future. This is because the political will to advance, or not advance, the public interest in social life, including the media, depends primarily on the ideological orientation of policymakers. And public service media are dedicated to promoting the public interest in social communication.

Puttnam (2007, pp. 128–129) argues that in a digital era, the definition of the public interest in media regulation must continue to be informed by three overriding principles:

- from the perspective of public policy, wherever the interests of the citizen conflicts with those of the marketplace, the “citizen interest” should have priority;
- diversity and plurality are the touchstones by which we measure the extent to which the citizen interest is being sustained and advanced;
- we should seek to ensure that all citizens have the means, and the ability, to make informed judgments regarding the nature and value of the media they access.

Puttnam (2007, p. 128) also warns against the conviction that the ubiquity of digital technologies in itself will ensure that the public interest will somehow prevail, as well as against the technological determinist belief that the new technologies could deliver enough content to guarantee diversity and plurality in itself. Finally, he says that the media “cannot be crudely reduced to the status of being mere

commodities, any more than other vital aspects of a self-respecting democracy such as our systems of justice, health, education or, more recently, the security of supply of water, light and heat.”

This is eloquent testimony to the continuing need for public service media. It is up to them, however, to understand how much the public interest and the needs of citizens have changed, and to reinvent themselves to serve those needs. In the end, the future of PSM will be determined in those moments when media users decide whether to turn to PSM.

NOTES

¹ See O'Reilly, T. (2005) *What Is Web 2.0: Design Patterns and Business Models for the Next Generation of Software* (<http://www.oreillynet.com/lpt/a/6228/>); retrieved February 16, 2008); Sifry, D. (2006) *State of the Blogosphere* (<http://www.sifry.com/alerts/>; retrieved February 16, 2008).

² Stark, E. (2006) *Free Culture and the Internet: A New Semiotic Democracy* (http://www.opendemocracy.net/arts-commons/semiotic_3662.jsp#; retrieved February 16, 2008).

³ *Friday Night with Jonathan Ross* is a television chat show on BBC One. The program features Ross's views on current topics, guest interviews (usually three per show), and live music from both a guest music group and the house band.

⁴ Tryhorn, Ch. (2008) "Ofcom Scraps 'Public Service Publisher' Plans." In *The Guardian*, March 12, 2008 (<http://www.guardian.co.uk/media/2008/mar/12/ofcom.digitalmedia>; retrieved March 23, 2008).

⁵ Madden, M. (2004) *Artists, Musicians and the Internet*. Washington, D.C.: Pew Internet & American Life Project.

⁶ Feuilherade, P. (2006) *Digital Media "Empowering Users"* (<http://news.bbc.co.uk/2/hi/technology/4781590.stm>; retrieved March 4, 2008).

CHAPTER 11

Regulating Media Concentration within the Council of Europe and the European Union

MIHÁLY GÁLIK

Media products are as much cultural/political goods and services as they are economic goods and services. Given media products' dual nature, it makes sense to differentiate between concentration in the media economic market and concentration in the political and/or cultural market (in the "marketplace of ideas"). As far as the media economic market is concerned, the issue of concentration is addressed by the general competition policy. Nevertheless, the vital importance of contemporary media may justify applying sector-specific concentration rules in the media industries. Indeed, this argument has been the cornerstone for media policies in democracies all over the world. Efforts to change regulatory practices and introduce new regulatory tools are taking shape both in the Member States of the European Union and in the United States, corresponding to the needs of a new, digital media environment. Besides dealing with the theoretical background behind media concentration measurement, this chapter focuses on the changes in regulatory processes over the last ten to fifteen years and summarizes the conflicting concepts and conflicting interests in efforts to regulate media concentration at a common European level.

11.1. Media concentration as an issue for scholars, businesses, and the general public

As most media scholars agree, there is a strong link between the level of media concentration and media pluralism and/or media diversity.¹ The existence of this link corresponds both to some theoretical principles (e.g. the link between structure, conduct, and performance in an industry—an approach quite common in media economics schools)

and numerous research findings. It is also supported by common sense. Nevertheless, it seems to be indirect in most cases, and it is rather hard to identify direct links between media concentration and media diversity.

However, there are real reasons for concern about media concentration. It can harm consumers, competitors, and society as a whole. Media ownership concentration, as most scholars emphasize, raises two broad policy concerns. First, media firms with market power can restrict output, provide poorer services, and raise prices, reducing consumers' economic welfare. Second, media concentration threatens diversity in media supply. It can hinder competition in the marketplace of ideas, restrict people's chances of receiving information on public matters, and restrict people's access to the media, reducing what could be called citizens' communication welfare.

Economies of scale and economies of scope, the two main factors behind concentrated markets, are fairly common in media industries, and most media scholars agree that media industries tend to be rather concentrated. Besides economies of scale and economies of scope, other factors also influence the level of media concentration. Managerial ambitions for company growth even at the expense of profitability, efforts to lower business risk, securing core resources, and counterbalancing the effects of business cycles are included in these factors, and it is quite obvious that a desire for social and/or political influence can be identified behind some mergers and acquisitions. All in all, typical forms of media concentration—horizontal, vertical, and diagonal/cross—seem to reflect the growth strategies of firms and respond to changes in the business environment (Picard, 1998).

As globalization in the media increases, some have suggested regulating media concentration on the transnational level. Although competition legislation on the EU level is also applied to media industries, so there is a basis for common European control of media concentration in the 27 Member States, most of them have sector-specific rules in this field as well, and the relevant national legislation differs widely.

Both the Council of Europe (CoE) and the European Union (EU) have been trying to formulate a distinctive and comprehensive media policy, as countless documents testify. The two European organizations put great emphasis on strengthening media pluralism/media diversity,

and they have often expressed the need for common media concentration regulation in Europe. Of course, overcoming the problems of designing, legislating, and implementing this common, sector-specific regulation will not be simple if the EU decides to follow this line. Is that a likely outcome, and is it really necessary in order to maintain and strengthen diversity in the European media scene?

11.2. Defining concentration

In the broadest terms, concentration indicates the level of competition in an industry. An industry consists of firms producing products that can be substituted for one another by consumers. The level of competition can range from pure (perfect) competition to pure monopoly, from many sellers/service providers representing only a small part of the market to one seller/service provider that rules the market.

“Relevant market” is a basic term applied in examining industry concentration. When determining a relevant market, both a product and a geographic market are defined. Products of comparable price and usage are a part of the same product market, and consumers may substitute them for one another (demand substitutability). It also needs to be considered whether other products on the market could be rapidly changed in order to substitute for others, or whether any firms are willing and able to supply products if the price increases (supply substitutability). When determining the geographic market, transportability and the costs thereof are particularly important.

There are different indicators for measuring concentration, such as output, assets, use/consumption, and turnover/revenue, and showing the size distribution of market actors in a given industry. The number of actors in any industry depends on numerous factors, from product characteristics to the size of the national economy.

Article 3 of the EC Merger Regulation (the Council Regulation of 139/2004/EC on the control of concentration between undertakings, European Council 2004) goes into detail on different forms of business decisions that lead to higher levels of concentration in an industry. Where a change of control on a lasting basis results from the merger of previously independent undertakings, or from acquisition by one or more persons already controlling at least one undertaking,

concentration shall be deemed to arise (M&A cases), and the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall also constitute a concentration. Of course, any M&A case by definition results in increasing the level of concentration in a given industry.²

Media goods and services are as much cultural/political goods and services as they are economic goods and services. Taking into account this dual nature of media goods and services it makes sense to differentiate between measuring concentration in the media economic market, and measuring concentration in the political and/or cultural market (in the “marketplace of ideas”).

11.3. Issues of measuring concentration in the media economic market

Concerning the media economic market, the issue of concentration is addressed by the general competition policy: “The economic problem is not in any significant way different from the problem of concentration in other industries” (Owen, 2005, p. 7). Many media economics scholars share this approach (Rott and Kohlschein, 2006). Nevertheless, measuring concentration in the media economic market raises serious methodological problems.

Media products—such as newspapers, magazines, radio, and television programs—are linked to technologies. When analyzing media concentration, technologies used in production and distribution frequently overtake the content. This situation also prevails today. At the same time the products aim to satisfy various consumer needs: for instance, political dailies and weeklies provide not only news, views, analysis, and background information but entertainment content as well. Comparing them with tabloid newspapers’ content, we see that tabloids give different weight to public events, give different coverage of the same news, give more room to pictures than to text and, of course, give first priority to entertainment.

Searching for media product markets that are based on substitutability leads to focusing on media content. Different consumer needs are satisfied by different content, so this content can form different product markets as follows:

- news market
- opinion market
- entertainment market
- sitcoms
- shows (game, reality, talk, contest, etc.)
- soap operas
- sport, etc.
- culture/education market
- advertising market

Defining media markets by product content and not by the means of production and transmission of the products is the first principle underpinning the rules governing media concentration suggested by Robinson (1995). Nevertheless, precise distinctions among media content are, in many cases, nearly impossible. It is hard to tell where information ends and where entertainment begins, as the widely used term “infotainment” testifies. Defining relevant product markets runs into difficulties, as interpreting product substitution and aggregating production and consumption this way involves much more uncertainty than the traditional methods of measuring media products and services.

Taking the example of the news market, the question has to be answered whether, from a consumer’s point of view, newspaper, magazine, radio, television, and portal news are substitutes for one another (i.e., whether they belong to the same industry). Additionally, one must decide whether to treat as equivalent the same amounts of time spent listening to radio news, watching television news, and reading news in newspapers. Since listening to the radio is generally a background activity, it is hard to accept that they are equivalent. But if they are not, it is difficult to aggregate different consumption figures measured by time spent.

British research institutes and authorities tried to address these methodological problems in the early 1990s, but the results were not convincing (Robinson, 1995). It seems nowadays that summing up consumption figures by different media contents and/or functions cannot meet the strict requirement of practical legislation, so this method, regardless of its theoretical merits, has little value, if any, in regulating media concentration.

11.4. Regulatory tools in the political and/or cultural market (in the “marketplace of ideas”)

Multimedia conglomerates reach huge audiences and exert political and cultural influence on the public, so there exist relevant markets in a political and cultural sense, too, argues Iosifides (1997a, p. 646). At the same time, he raises the question: “Are measures tailored to measure economic concentration good enough to capture concentration levels in the political and cultural market, the so-called ‘marketplace for ideas’?” It is hard to answer this question with a simple yes or no, and media scholars seem deeply divided on this issue.

In searching for effective measurement of media concentration, a precise definition of “relevant market” in terms of competition regulation is not enough. The market for news and opinion needs more regulation than entertainment markets, suggests Robinson (1995, p. 54). Sánchez-Tabarnero and Carvajal (2002, pp. 148–149) propose to lower the threshold set by the EC Merger Regulation on control of concentration between undertakings if media firms are concerned in merger and acquisition cases in the EU Member States. Whether we share these views or not, it is true that the promotion of media diversity/media pluralism is perhaps the most important policy objective in democratic societies all over the world.

The initiatives of the Council of Europe to promote media pluralism and curb media concentration go back to the mid-1970s. Numerous documents, such as resolutions, recommendations, declarations by the Committee of Ministers, and studies by experts’ groups have addressed the subject since then. One can say that the Council of Europe has put emphasis on protecting media pluralism instead of focusing directly on regulating media concentration at a common European level.

Defining media pluralism is not an easy exercise; various bodies of the Council of Europe have developed the notion of media pluralism over the last few decades. Although there are different angles, media pluralism is seen mainly as pluralism of media content. That is, the diversity of media content marketed and available to the general public is the central concept of the term. As the Declaration on the Freedom of Expression and Information, adopted by the Committee

of Ministers in 1982, says, "The member states of the Council of Europe [...] should adopt policies to foster as much as possible a variety of media and a plurality of information sources, thereby allowing a plurality of ideas and opinions" (Council of Europe, Committee of Ministers, 1982).

The Group of Experts on Media Pluralism measures the diversity of media supply according to four elements:

- "a.) the existence of a plurality of autonomous and independent media;
- b.) diversity of media types and contents available to the public, resulting in a diversity of choice;
- c.) segments of society capable of addressing the public by means of media owned by, or affiliated to them;
- d.) diversity of media contents in relation to:
 - media functions (information, education, entertainment, etc.)
 - issues covered (range of subjects, opinions and ideas covered by and represented by the media)
 - audience groups served" (Jakubowicz, 2006b, pp. 5–6).

Looking at the efforts to describe media pluralism and/or media diversity in the United States, the Federal Communications Commission defines five types of diversity pertinent to media ownership policy: viewpoint, outlet, program, source, and minority and female ownership diversity (FCC, 2003, p. 8). The variety of viewpoints available to the public is closely linked to the number of independent media outlets in a given market, and a variety of program formats is best achieved by reliance on competitive markets. Nevertheless, the FCC rejects the notion that promotion of competition through antitrust would ensure adequate viewpoint diversity.

The idea that the vital importance of contemporary media justifies the sector-specific concentration rules regarding media industries has been the cornerstone for media policies in democracies all over the world. Policy objectives like ensuring media pluralism; protecting freedom of expression; and fostering reflection in the media of diverse views and opinions that characterize a democratic society have been supported by a different set of instruments in the field of media concentration regulation that reach far beyond the scope of general competition law.

The additional controls applied range from maximizing the number of broadcasting licenses one entity may hold in a specific geographic (local, regional, national) market to cross-media restrictions, from specific merger control rules to maximizing voting rights in a television broadcaster, from audience share ceilings to foreign ownership rules, and so on. The wide variety of regulatory measures is based mostly on traditions and mirrors a common belief that competition law (antitrust legislation), regardless of its own merits in maintaining and developing media diversity, cannot replace specific national controls.

While no one questions the paramount social importance and weight of contemporary media, the need for sector-specific regulation over media concentration has been challenged by some leading scholars.

“The primary rationale for [media] regulation has been the need to compensate the imbalance of power between huge monopoly suppliers and small and ignorant users. In a converged environment with full choice, however, the imbalance will change. This will solve traditional problems of [...] content diversity,” said Eli Noam (1996, p. 46), at the dawn of the media’s digital age.

Of course, this techno-optimistic vision can be challenged now that ten years have passed. But the conclusion that new times need new regulation seems valid: Interconnectivity among networks and maintaining support mechanisms for universal connectivity constitute primary goals for regulation in the digital age. Besides, as we are witnessing, sector-specific media concentration rules have been abolished in some European countries in recent years (European Commission—DG Information Society and Media, 2007a). These two things demonstrate that times have truly changed, and that the conventional wisdom, which takes for granted the need for sector-specific concentration measures in the media, no longer helps by itself.

A look at various nation-states suggests that the trend of deregulation has prevailed both in Europe and in the U.S. over the last ten to fifteen years. The ceiling on the number of broadcasting licenses is slowly being repealed and/or replaced by audience share limits in the European countries where specific media concentration measures are applied. The same ceilings in local radio and television were lowered in the United States by the FCC after the Telecommunications Act of 1996 was passed. Cross-media restrictions are tending to loosen in other countries as well.

11.5. Conflicting concepts and conflicting interests: efforts to regulate media concentration at a common European level

The Council Regulation of 4064/89/EEC on the control of concentrations between undertakings³ as part of competition legislation within the Community laid down the rules for M&A cases on a common European level, and it covered some media concentration cases as well. Article 21 (3) gave power to Member States to take appropriate measures to protect the plurality of media while applying this law, but the objective of regulating media concentration in general at Community level has been far more ambitious than this tiny legal loophole.

Support for sector-specific regulation has been widely shared by both media scholars and MPs of the European Parliament. When preparing legislation on cross-border television in the 1980s, many experts and MPs argued for covering media concentration in the EU directive, and the same is true for the Council of Europe Convention on cross-border television, but in the end, these efforts failed.

At the end of 1992, the Commission of the European Communities published a policy document (Green Paper) under the title “Pluralism and Media Concentration in the Internal Market—An Assessment of the Need for Community Action” (European Commission, 1992). The Green Paper outlines three possible options on the regulation of media concentration at Community level:

- no specific action;
- action regulating transparency;
- action to harmonize laws.

Out of the three options, the first one was chosen. Nevertheless, it was not an easy outcome, as debates within the College of Commissioners and among the Directorate Generals lasted for years. Council regulation as a tool for legislating media concentration was ruled out from the very beginning, and the two proposals on a media concentration directive that were tabled in the mid 1990s did not have the backing necessary for passage by the Commission. Consequently, efforts at legislating media concentration at Community level were phased out by the end of the 1990s (Doyle, 2002).

Pursuing two goals simultaneously—protecting media pluralism and creating a single European media market—involves a built-in contradiction between the two goals (Harrison and Woods, 2001). Attempting to reconcile these conflicting objectives, we arrive at a gray zone of regulation: Optimal regulation of media concentration at a common European level simply does not exist in a normative sense, due to irreconcilable differences in the regulatory process, so there are only different kinds of options.

Stakeholders have different interests concerning regulation of media concentration at the common European level. The difference between the interests of industry players and the general public is obvious, as it stems from the dual nature (cultural/political and economic) of media goods and services. This conflict was even mirrored in the approaches of different Directorates-General of the European Commission toward regulating media concentration at EU level until the mid-1990s (Harcourt, 1998).

There is a hidden conflict between Member States and the Commission as well. Although the need for common regulation on media concentration is not questioned publicly by Member States in the European Union, direct regulatory tools are not applied at the Community level. On the one hand, Member States strive to incorporate their own regulatory vision at the EU level and are not keen to arrive at a consensus. On the other hand, Member States seem reluctant to give up their own regulatory power on media concentration for political reasons: One can say that political elites in nation-states are reluctant to cede even a part of their sector-specific regulatory power on media concentration to the Community.

Although there is no specific media concentration legislation at the Community level, the recognition of the role of public service broadcasting, a number of existing legal instruments (Amsterdam Protocol, AVMS directive), and action programs (eEurope, i2010, Media+ series) contribute directly or indirectly to curbing media concentration at the Community level. Member States obviously have broad power in taking measures and promoting the non-market part of the national media scene, and in exercising this power they exert influence on concentration of the audiovisual media in general.⁴

A policy document, *The Future of European Regulatory Audiovisual Policy*, issued by the Commission (European Commission, 2003),

stresses that safeguarding media pluralism involves limiting the level of media concentration: “Measures to ensure media pluralism typically limit maximum holdings in media companies and prevent cumulative control or participation in several media companies at the same time” (European Commission, 2003, p. 8).

The European Parliament volunteered to revitalize the efforts on regulating media concentration at a Community level, and it adopted a resolution on media concentration on November 20, 2002.⁵ MPs called on the Commission to launch a broad and comprehensive consultation process on media pluralism and media concentration and to draw up an updated Green Paper by the end of 2003, but the Commission failed to meet this deadline. Of course, during the tiresome process of preparing the long-awaited amendment to the TWVF directive and while working on the Audiovisual Media Services Directive, which was finally adopted at the end of 2007 (European Parliament and the Council, 2007), the topic was discussed in some sense, but it was clearly outside the center of debate.

11.6. Recent efforts to measure diversity and regulate concentration in the media scene

The Federal Communications Commission relaxed its media ownership rules slightly in 2003 and created a new tool called the Diversity Index (DI) in order to measure the diversity of sources of media content available in local markets. The DI is applied in the market of news and public affairs and counts the number of media outlets in local markets. For the national markets of news and public affairs, there are multiple sources available to the general public, and the FCC believes that no governmental regulation is needed to preserve access to them (FCC, 2003, pp. 163–164).

Instead of weighting individual media channels by revenue or audience size, the DI introduces medium-specific weights based on the survey information derived from the “Consumer Survey on Media Usage” prepared by Nielsen Media Research. These weights represent the relative importance of each medium to the public, and they are used to aggregate independently owned media outlets as sources in the local news market. Each independent outlet, irrespective of its

audience share, is treated as an equal source of information and named “voice.” “By analogy with competition analysis, the diversity index is inspired by the Herfindahl-Hirschmann index (HHI) formulation,⁶ calculating the sum of squared market shares of relevant providers in each local market” (FCC, 2003, pp. 159–160).

The FCC believes that the DI can be used for similar purposes in the marketplace of ideas, as the DI reflects the degree of concentration of viewpoint diversity in local markets: “While the Diversity Index is not perfect, nor absolutely precise, it is certainly a useful tool to inform our judgment in decision-making. It provides us with guidance, informing us about the marketplace and giving us a sense of relative weights of different media. It informs, but does not replace, our judgment in establishing rules of general applicability that determine where we should draw lines between diverse and concentrated markets” (FCC, 2003, p. 158). It seems obvious that DI would serve for the FCC as an indicator in concentration regulation and/or in analyzing M&A cases in the electronic media.

Although the FCC’s proposal to create the DI and use it to measure the news and public affairs market has not become a part of its media ownership regulation, it ignited seminal professional debate among media scholars in the United States. Owen (2005), who regards the present media ownership rules of the FCC as strictly unconstitutional, welcomes the DI as an important step toward measuring media concentration in a more sensible way. He is convinced that it makes no sense to measure media concentration using revenue or audience weights: If popularity and/or use in a given channel arises from consumer choice rather than structural barriers to market entry, potential sources of news are equal to citizens. He supports using the DI to count voices in a given market, but he sees serious flaws in its construction. In the end, his criticism outweighs his support, and he rejects the use of the DI.

Noam also emphasizes that the “voice count” measure is not without merit, but unlike Owen, he does not accept the method that all voices are equal when counting independently owned media outlets in local markets. He argues that large media outlets have the resources—the talent, marketing strength, and brand value—and that their market power is used to obtain an audience. “Equality of opportunity does not mean an equality of outcomes. But merely counting the number of

participants in a market is not the best test applied in other industries. The question is how to bridge the two concepts, market power and voices. The starting point should be to acknowledge that both market power and diversity are legitimate factors to consider, and to omit the one or the other leaves out a major factor and invites reasoned opposition" (Noam, 2006, p. 72).

At the same time Noam proposes to construct a new index called the Media Ownership Concentration and Diversity Index (MOCDI), dividing the regular HHI that measures the market power in an industry by the square root of the number of voices in a media market. Additionally, he proposes to set media concentration thresholds that depend on the size of the market, and he is trying to construct a sensible formula as well. A thorough analysis of his proposed measurement tools is beyond the scope of this chapter, but we wish to emphasize that there is a real need to detach from the methods applied in regulating media concentration in the past.

As for Europe, responding to concerns on media concentration in the EU Member States, the Commission launched a new initiative on media pluralism in January 2007. The three-step approach contains:

- a Commission Staff Working Paper on Media Pluralism that was published in the beginning (European Commission—DG Information Society and the Media, 2007a);
- an independent study on media pluralism;
- a Commission Communication on the indicators for media pluralism in the EU Member States, on which a broad public consultation will take place.

The need for concrete indicators to measure media pluralism in Member States is emphasized in the Working Paper mentioned above. It even defines the structure of the study: Indicators should be developed on the policies and legal instruments that support media pluralism, and on the range of media available to citizens in different Member States; in addition, the study has to propose supply-side indicators on the economics of the media. Although there is no reference to the FCC's Diversity Index in the Staff Working Paper, one might well see a connection between the Commission's initiative to put the issue of media pluralism again on the agenda and the new way FCC is trying to handle media diversity.

As far as the Council of Europe is concerned, two documents relevant for pluralism issues were recently issued: “Recommendation on Media Pluralism and Diversity of Media Content” (Council of Europe, Committee of Ministers 2007c) and “Declaration on Protecting the Role of the Media in Democracy in the Context of Media Concentration” (Council of Europe, Committee of Ministers, 2007d), adopted by the Committee of Ministers on January 31, 2007. As regards the approach and focus of the documents, the Council of Europe follows its own tradition in dealing with media concentration. The new Recommendation covers ownership regulation in detail, declaring *inter alia* that ownership rules “may include introducing thresholds based on objective and realist criteria, such as the audience share, circulation, turnover/revenue, the share of capital or voting rights,” and also endorses scientific research on the subject.

11.7. Conclusion

As a result of convergence, both demand and supply substitutability tend to increase in media markets. Consumers can access media services via different electronic communication networks, and this very fact may lead to more diverse media consumption and less media concentration. Of course, increased supply substitutability is just an opportunity for consumers, and it does not in itself guarantee more diverse media consumption.

The rapid diffusion of broadband Internet household access in developed and emerging economies is accompanied by considerable changes in media use. On the one hand, demand for traditional media products and services is decreasing; on the other, the supply provided by amateurs or semi-professionals tends to reach bigger and bigger audiences. Generally speaking, the borders between public and private communication are blurring, as blogs, vlogs, and citizen journalism, as well as the remarkable popularity of social networking sites testify. The final result of mass customization in audiovisual media services, the so-called “egocasting” and the arrival of the “prosumer” define new kinds of audiovisual services outside the institutional media.

Although the need for common regulation on media concentration is not questioned openly in the European Union, in the digital media

age direct sector-specific regulatory tools are not applied at Community level. Member States seem reluctant to give up their own regulatory power on media concentration for political reasons.

Declarations on the vital importance of public service broadcasting in preserving media pluralism and limiting media concentration are very important, although EU and CoE Member States alike seem to retain their present regulatory powers in this field, too. Research projects on the system of public service broadcasting need more support from both the EU and the CoE, and co-opting community initiatives into public broadcasting services should be a relevant part of the research agenda.

Prospects for comprehensive common European regulation on media concentration look rather vague. The role of the Council of Europe in initiating regulatory measures on media concentration tends to be diminishing, due to EU enlargement. Nevertheless, research on the methodology of measuring media pluralism/diversity and regulating concentration really deserves support. The European Commission's new initiative on media pluralism seems promising in terms of revitalizing research in this field, as testified to by the launch of the project "Independent Study on Indicators for Media Pluralism in the Member States—Towards a Risk-Based Approach."

NOTES

¹ I tend to use the two terms as synonyms in this paper.

² As a matter of principle in management sciences, the reason behind M&A cases is to achieve competitive advantage in the market.

³ This regulation was renewed in 2004 as the Council Regulation of 139/2004/EC on the control of concentrations between undertakings (The EC Merger Regulation).

⁴ Considering the relevance of public service broadcasting within the context of limiting media concentration, it is worth mentioning that there are "government failures" alongside "market failures." The term "government failures" generally refers to the shortcomings in regulation of public institutions. Public service broadcasters are not at all exempt from these shortcomings, as recent research findings also indicate: Petković et al.(2004), OSI (2005).

⁵ OJ C 25 E, 29.1.2004, pp. 205–207.

⁶ The HHI is widely used in antitrust legislation in the United States, and its benchmark values guide the government in initiating steps in horizontal

M&A cases (Horizontal Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, 1992 and 1997). If the HHI in an industry is below 1000 in a post-merger situation, the government agencies in question consider the markets to be unconcentrated and, as a rule of thumb, require no further analysis. There is a set of rules in the Horizontal Merger Guidelines for horizontal M&A cases where post-merger HHI is between 1000 and 1800, and where it exceeds 1800; these cases do require further analysis and may lead to regulatory actions.

CHAPTER 12

Which Governance for the European Audiovisual Landscape?

A Multidimensional Perspective

GIANPIETRO MAZZOLENI and FAUSTO COLOMBO¹

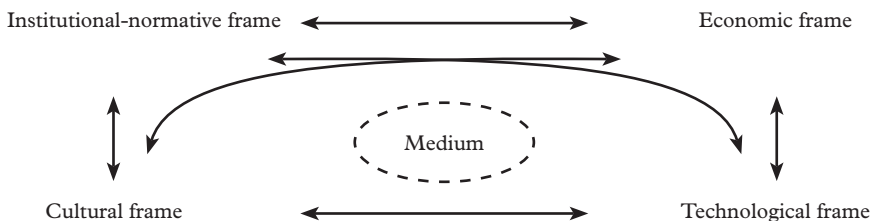
12.1. The new European audiovisual scene

The increasing complexity of the contemporary media landscape, undergoing digitalization and convergence, has made it urgent to rethink the media change and to look at it beyond its simple technological dimension.² The “paradigm of the digital revolution,” employed to emphasize the transformative aspects of digital technology, has given way to the “paradigm of convergence,” more apt to represent the multidimensionality of the media change processes, the role of the *subjects* beside that of the *technologies*, the mechanisms of hybridization and remediation between old and new media.

Briefly, we start by regarding the single medium, in a given historical period, as a transitory balance between a mix of social dimensions, which overtake the medium itself, but also shape it and are shaped by it. This argument could be represented as follows:³

The technological frame concerns invention, the development of hardware and software, the drawing up of standards and their life cycle, and the technological mix available to households. The economic framework refers both to the economic approach to production and

Figure 12.1. The multidimensional media model



consumer behavior and to the business models, market dynamics, financing mechanisms, and production organization. The institutional regulatory framework includes the principles and the laws, but also the parties and the real power relations, in the media domain, and takes into account the increasing interaction of national and supra-national institutions, such as the European Union. Finally, the cultural framework concerns the forms of cultural transmission and the trust placed in them, as well as the preferential content considered socially relevant.

In such a model every change inside a single frame affects the entire system. For example, in the 1960s and 1970s, the Italian radio landscape changed technologically (with the introduction of the transistor and the spread of Citizen's Band radio), institutionally (from monopoly to some competition), economically (from financing by license fee to financing through advertising), and culturally (new schedules and content, new language, new listening habits). Each dimension helped prompt changes throughout the field of radio broadcasting, giving birth to the *Nevo* Radio.

In Europe, television has undergone significant changes that have enlarged its market in terms of content, distribution, and structures. In particular, we have witnessed a transition from the dominant broadcasting model, PSB (Public Service Broadcasting), to the commercial one, especially through the inauguration in the 1980s—and explosive growth in the 1990s—of satellite and cable services.

Today it is above all the imminent switchover from analog to DTT (Digital Terrestrial Television) that represents the turn to television with many channels. It should be noted, however, that despite the diverse diffusion of the audiovisual platforms, the content market appears less developed. Europe is characterized by many language markets and cultural traditions that represent an objective barrier to a fluid exchange of European-based content. This forces the various countries to keep the level of internal circulation of content low, thus favoring U.S. productions (Steemer, 2004).

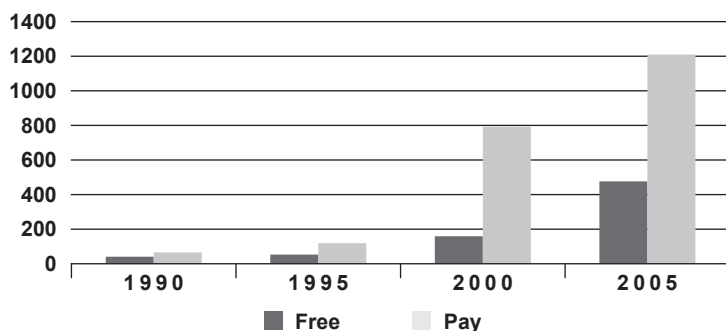
Consequently it is almost impossible to draw a “European map” of the changes underway. It is easier to track only a few trends common to countries that are more “similar” than others, but that inevitably hides the differences. With respect to digital television and thus to the rise of a multiplatform environment, the various analyses

emphasize the crucial years 2007–2012 for the definition of a convergent, multi-channel, multi-platform environment. Among the trends described in the forecasts on the European marketplace, two points should be emphasized:

1. the progressive growth of the multi-channel environment on the existing platforms, and also of the FTA (free-to-air) with the takeoff of the DTT, especially as pay (DTH, but also IpTV & MobileTV), as part of the more complex mid/long-term trend that has shown pay TV as the principal driver (see Figures 12.2 and 12.3);
2. the definition of a normative frame oriented to technological neutrality and to the extension of the publishing subjects (thus, more competition of platforms), but also as a push to agreements and alliances for content distribution on different platforms.

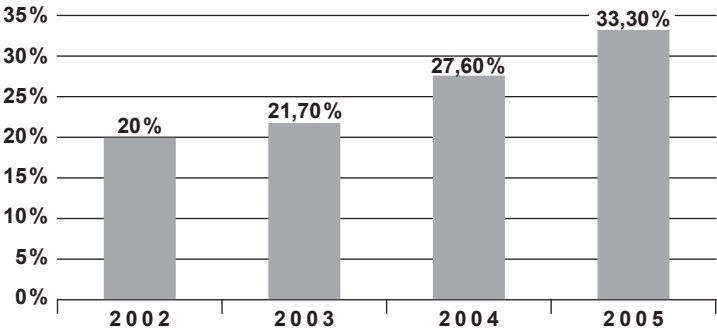
With respect to the spread of digital cable, IpTV, and “multi-play” (see Figure 12.4), the platform “broadband cable” appears to be a reality under consolidation in the European domain, with 100 million households reached by cable, 64 million receiving cable TV services, and 7.1 million receiving cable-carried Digital TV (9 million Internet; 7.5 million telephony) and thus able to prompt the diffusion of the “triple play” model: data, TV, and telephones (+ wireless) (see Figure 12.5).

*Figure 12.2. Multi-channel environment in Europe:
Number of channels in the European TV landscape*



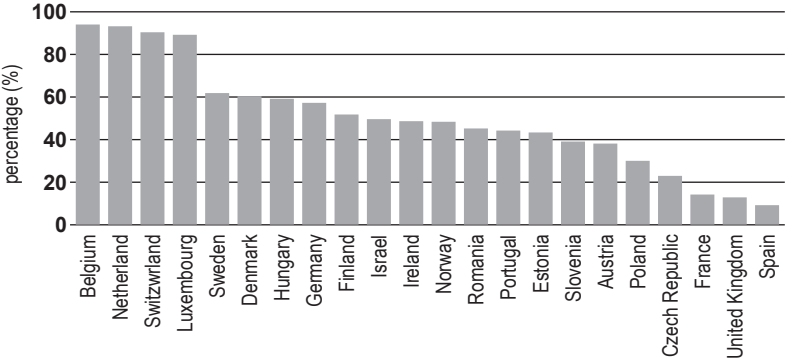
Source: Booz Allen & Hamilton/Screen Digest

Figure 12.3. Digitalization of TV in Europe



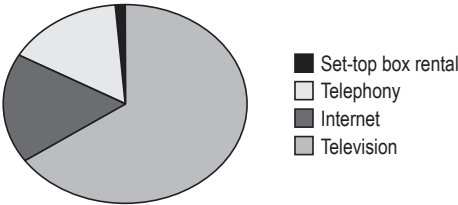
Notes: The reach of Digital TV in Europe has reached 55,6 million households /tv in 2005 (33.3%).
Source: ITMedia Consulting

Figure 12.4. Penetration of Cable in Europe (2005)



Source: Screen Digest / Cable Europe Yearbook.

Figure 12.5. Triple-play model (2005)



Source: Screen Digest / Cable Europe Yearbook.
Notes: Earnings of the cable platforms in Europe: 17,2 billion euro, 2/3 of which from TV services.

12.2. The concepts of pluralism and concentration

The rise of the new media and digitalization have laid the foundation for a far-reaching change in media systems. This change is driven by the different players that operate in the contemporary media environment: multimedia conglomerates (on the supply side), public institutions (on the regulation side), and consumers. The European media transition is not an orderly or inevitable process, led by an array of new ICTs (Information Communication Technologies). Instead, it is a complex phenomenon in constant tension.

Today, at the global level, we are witnessing a phase marked by tactical decisions and unforeseeable outcomes, as well as by strong competing interests. Europe is experiencing concentration and trends repositioning media in all sectors, amplified by the diffusion of new-generation networks (landline and wireless) that allow for the provision of convergent services and the sale of integrated/premium services. This trend toward concentration has drawn the attention of public authorities domestically and internationally. One important question is how to manage the evolution of an economic domain without the risks of dominant positions and concentrations, but instead with functional efficiency of the system offering competition among players with consequences on the quality and the cost of the services offered.

Among the risks that concern authorities are the concentration or mono/oligopoly of the platforms. The digital-multiplatform environment forces the redefinition of strategies adopted by the market players along the competition/alliance/conglomeration axis. On the one hand the rise of the offer, the fragmentation of the market, and the “technological neutrality” prompts stronger competition between the old players (i.e. broadcasters) and the new ones (content providers). On the other hand, it compels the building of alliances (for example, between publishers and TLC (Telecommunication) companies for the distribution of content on diverse platforms) or to build larger conglomerates (like News Corp’s expansion policies, presently focused on the Net and the IpTV).

The issue of concentration versus media pluralism is one of the hottest in the debate over media-market regulation.⁴ The defense of pluralism is indeed considered a pivotal factor for democracy, to the

point that the EU decided to defend it like the traditional rights to information and freedom of expression, as stated in the Charter of the Fundamental Rights of the EU (Article 11).⁵ Media pluralism is a concept that covers different issues, including the diversification and regulation of ownership, the variety of information and content resources, the development of new communication technologies and services, the regulation of licenses to broadcasting, and the protection of PSB.

However, the issue of ownership is the most debated aspect of the concentration/pluralism dynamic, because it is considered the most important precondition for the diversity of opinion. The concentration of ownership may lead to exclusion or under-representation of certain voices of the public debate, and to favoring others, clearly abusing political and commercial power.

The EU merits the protection of media pluralism, seen as a principal guarantor for citizens' access to the diversity of information and opinion sources. As K. Jakubowicz (2006b) observes, if we want to identify clearly and to resolve the question of the protection of media pluralism, it is necessary to come up with "a broader approach, covering a much wider range of issues which bear on the question of pluralism of content" (Jakubowicz, 2006b).

If media pluralism is a crucial issue in the international discussion on media policy, it is also true that the interpretations given to this concept vary a great deal, as well as the proposals to make it operational. Pluralism (and the risk of media concentration) is associated with different issues, according to political and cultural contexts. During the Liverpool Audiovisual Conference (September 20–22, 2005), the Working Group 5 focused on this topic, struggling to reach an agreed definition, especially vis-à-vis the diversity of interpretations that characterizes the new members.

We are facing a complex period in which the old and the new media cohabit; new and old European regulations coexist, and different ideologies clash. On the one hand, there is a normative ground, with rationales rooted in social-democratic ideology, emphasizing a market-correcting regulatory approach and strong PSB institutions. On the other hand, there is a normative expectation, rooted in neoliberal ideology, that a deregulated telecommunications market will gain priority, accompanied by trends of liberalization, tax reduction, and subsidies. Media regulation faces the challenges of this contradiction. The most

urgent issues include the delicate interaction between the media and political powers; the impact of concentration on economic competition and the quality of content; the safeguarding of PSB as a key player in the pluralism/diversity game; and the problem of transparency of ownership (especially acute in the new Member States).

12.3. The revision of the TVWF Directive

The two traditional regulatory tools used by European bodies for media and audiovisual policies are the TVWF (Television Without Frontiers) Directive, adopted by the EU, and the European Convention on Transfrontier Television, adopted by the Council of Europe. Both were adopted in 1989. The TVWF aimed to guarantee the free circulation of broadcasting services within the borders of the EU. It also sought to safeguard some key public interests, such as cultural diversity, consumer protection, the protection of minors, and the promotion of the production and distribution of European television programs by defining quotas. The broadcasters were asked to reserve at least 10 percent of their transmission time, and 10 percent of their budget, for European works made by independent producers (Article 5).

On December 11, 2007, the European Commission, in response to the technological changes that have brought about new conditions for the competition in Europe, adopted the long-awaited Audiovisual Media Services Directive (European Parliament and the Council, 2007) that amended the existing norms following the dramatic technological and commercial developments in the field. The Directive aims to mitigate the differences in the regulations among the different distribution devices (such as analog TV, video on demand, mobile TV, and new media advertising). The Directive introduces a new distinction between the “linear” services (based on scheduled programs, subjected to obligations similar to those considered by the TVWF) and “non-linear” ones (TV, information, audiovisual services on demand).

According to the AVMS Directive, the filmmakers (cinema and TV) will have greater flexibility to produce digital content that can be provided to consumers free of charge, thanks to advertising. The Directive also reaffirms the pillars of the European audiovisual model based on protection of cultural diversity, minors, consumer rights, and

media pluralism, as well as a ban on racial or religious discrimination. It also aims to strengthen the competitiveness of the European audiovisual industry, allowing providers to exploit the advantages of the internal market, independently of the technology employed.

More flexible norms are foreseen for traditional TV broadcasting, taking into account technological developments and changes in viewers' habits. As regards the issue of media pluralism in the 27 Member States, the new AVMS Directive is designed to open the domestic media markets to stronger competition from other EU countries, in order to further diversify the offer of TV/AV content on demand across Europe.

The pivot of the new EU policy continues to be the principle of the "country of origin," much as in the previous 1989 Directive. This principle was indeed crucial in promoting the satellite trans-frontier television and in the progressive diffusion of pan-European TV channels. In the future, following the same principle, the audiovisual service providers other than TV channels (e.g. video, news, sport on demand, or content that can be downloaded on mobile devices) will be allowed to follow their own domestic regulations.

12.4. Some critical reflections

The overall regulatory institutional frame of the traditional media, telecommunications, and new audiovisual services—comprising regulations, laws, and various players at different levels—is characterized by increasing interaction between the supra-national, European, and national institutions.

This situation calls for a general re-thinking of the whole governance of the media development in Europe vis-à-vis the differences among the domestic-oriented national legislations and the regulations and institutions at the EU level. Obviously no one claims a sort of political determinism. What is needed is the discarding of the utopia (or dystopia) of a market that governs the media development only on the basis of supply-and-demand dynamics, or of a technology that imposes itself only by means of its innovative strength.

This changing landscape reveals several problem areas. In the first place, players with divergent stances employ contrasting tools for intervening in the "battlefield." For example, a comparative analysis of

digitalization involving several countries can identify the differences and similarities between the national systems, and as a result, display the heterogeneity of the roads to digitalization as well as the implementation of incentives to technological innovation. It is not by chance that a central issue in public debate is the question of the “digital divide,” a debate that, by virtue of its political-strategic nature, clashes with the complexity of the underlying problems in a transnational-multidimensional perspective.

Second, the heterogeneity of the European population in terms of language, age, income, education, and digital and media skills is a serious problem that the European institutions cannot face without repercussions. Moreover, the idea that the ICT system should be governed with a free-market approach in order to work well and to reduce distortions (from the supply side, the concentrations, and from the demand side, the digital divide) is questionable for two reasons. First, if governments and legislators choose not to establish rules correcting the (free) market operations, the consequences and implications would be as worrisome as if they decide to work out binding rules. Second, the idea that the governance of the Information Society should be based on interventions that touch upon the sole economic domains would entail the omission of other phenomena that compose the multi-dimensional character of current communication development. To understand these aspects, we should examine the relationship among the four frames of the multidimensional model presented here, which displays the dynamism of the media “object,” at the center of balancing forces that rise and develop in society.

1) Media between institutions and economy

It is unthinkable to reflect on media without taking into consideration the capacity of institutions to mold the dynamics of the market, and vice versa. This two-way dynamic is extremely evident, for example, in Italy, where legislation on media has heavily influenced the structure of the market and business models. Such influence has come from both the presence and, above all, the absence of legislation. One example is the rise of commercial broadcasting: The lack of regulation in the 1970s and 1980s led to a fierce war to seize transmission frequencies. In this “Wild West,” the strongest (like Berlusconi’s Mediaset) were eventually the winners. Another example is the more recent regulation

regarding the digital changeover: The law passed by the Berlusconi government allows for existing players (public and private) to preserve the oligopoly of frequencies.

2) Media between economy and technology

The economy-media-technology relationship has a specific dynamic: It is not always completely rational but instead is profit-oriented. It is interesting to follow what forces prompt the market to back a given technology and given standards. The case of digital terrestrial in Italy is again an enlightening example. It has helped the diffusion of interactive decoders, thus keeping the sale price affordable but blocking the path to the subsequent development of evolved on-demand services.

In fact, the decoders marketed in the domestic market are relatively inexpensive due to their simplified technology (they are not equipped with a DSL connection). This makes them unsuitable for complex on-demand and interactive services based on broadband connections. The result is that DTT decoders in Italy still remain only a “moderate evolution of television” and not a new home platform for services of the ICT world. The primary goal of the policymakers has been to speed the obsolescence of analog television. This choice has damaged the development and diffusion of new, more sophisticated services.

3) Media between technology and culture

The dynamics of this relationship have to do with the willingness to accept technological innovation and resistance to it, the interest in the content it conveys, and the ease and methods of adaptation, reflecting the capacity of technology to establish a dialogue with the society that accepts it. From this perspective it is extremely interesting to note the diffusion of digital terrestrial in Italy, after years of the centrality of television in Italians’ media diet. Leaving aside the rhetoric of DTT as an ICT platform at low cost, the capacity of digital terrestrial television to be absorbed as a profoundly audio/televisual technology reveals the strength of the experience of technology that clashes with the persistence of the traditional view of television as a tool to educate the public.

4) Media between culture and institutions

This relation can be described by the intersection among culture, media, and institutions, reinforcing the role of the communication media

as cultural agencies, but also reaffirming the links with the institutions and the laws, and shaping the level of public trust and participation. What emerges from these interconnections is not only the media statute (is it more socially relevant to have access to the Internet or to digital television?), but also the role institutions must play in the governance of a media system. Let us take the idea of public service: The idea that a community, through the license fee, contributes to the financing of one or more public networks is directly connected to the theme of faith in institutions but also in the statute of the communication media to operate as an agency generating sociable behavior and citizenship.

5) Media between institutions and technologies

There is a naive and deterministic belief that technologies advance on independent tracks, speeding up and slowing down depending on the internal characteristics of innovation. In reality, in the race towards the diffusion of a technology, the regulatory and institutional dimension often intervenes decisively, either for or against. One notable case is policymakers' handling of the development of DTT in Italy. An entire regulatory system was oriented toward the diffusion of a technology, reputedly the most profitable not only for its intrinsic technical features, but above all because it was considered most suitable for easing the digital transition and for maintaining the market's existing ownership structure.

6) Media between economy and culture

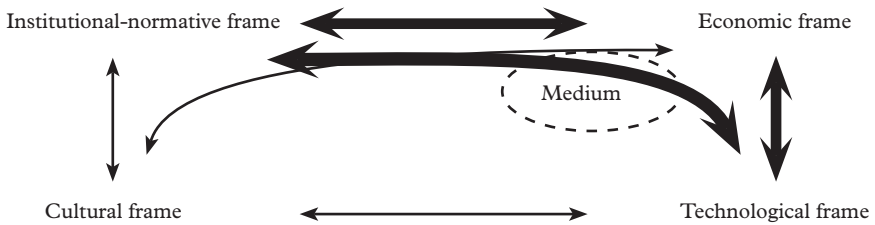
The dynamics that in the media domains describe the intersection between economy and culture concern the framing of economic behavior in cultural environments. It may be useful in this context to reflect, for example, on the value attributed to the premium programs of DTT. Italian consumers seem to assign an adequate value to the cost of this content, particularly for soccer and movies. The reason might lie in Italy's satellite and cable television history. The introduction of paid services, in the context of the provision of free commercial television, eventually convinced Italian consumers that certain content (such as movies) could only be enjoyed when paid for. So DTT once again has not been perceived as a low-cost ICT platform, but rather as a cheap television service, capable of fulfilling contingent needs. The

pay-per-view mechanism has readily been made familiar to consumers by the enormous diffusion of prepaid mobile phone cards.

12.5. Conclusion

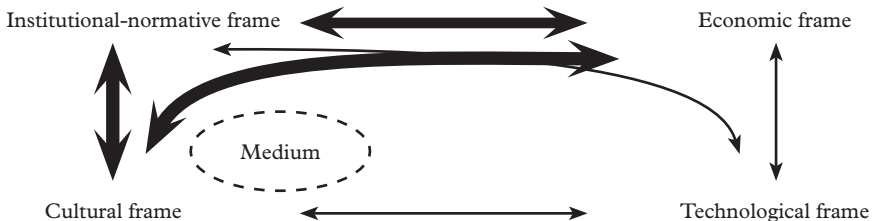
This chapter has discussed whether new television/ICT systems should be governed by a free-market approach in order to work properly. The EU “free-market model” policies treat the medium according to its economic and technological dimensions. For these media policies, the main instruments to govern the media appear to be the management of digitalization (switchover, subsidies for consumers and producers to push technological transition) and the control of market concentration and competition.

Figure 12.6. Free market media model



We argue that the regulation of the system, to prevent distortions typical of an oligopolistic market but also to reaffirm the cultural implications of media systems, is a necessary condition for solving the problems of access to the Information Society and, in general, for rethinking the role of PSB in promoting citizenship.

Figure 12.7. PSB model



We think it is impossible to implement a true governance policy of the (new) media without understanding the multi-dimensional nature of the media system. It is naive dirigisme to consider building an effective new media policy only with legislative tools, for example with the aim of reducing the risks of pockets of “technological depression,” without a clear idea of how the economic, cultural, and technological dimensions are related. To govern the change, one must comprehend all four dimensions of the process. It is no coincidence that the most advanced innovation rates are in the Nordic countries, which have a long tradition of public intervention (welfare). By contrast, a negative example is the Italian case of the public subsidies for the diffusion of DTT, which reveals an outdated public dirigisme.⁶

A new policy for digital media is needed to help various EU countries avoid widening the gap between the “haves” and “have-nots,” possibly by governing media development in a way that takes into account the specificities of individual (national and local) contexts, but at the same time makes it a priority to fill the digital gap.

The new digital technologies demand decisiveness in choosing and promoting infrastructures (broadband, Wi-max and the like), and in the concessions of licenses for content provision and technological solutions to private players. In such a media landscape, each of the two models has limits in fulfilling the new exigencies. The PSB model is based on the idea that the state should create the conditions for diffusions (i.e., the network), as well as ensure the diffusion itself and the production of content. The market model entrusts this all to private players and marketplace competition.

One concrete solution would be for the public intervention to focus on the technological dimension, restraining its content-production function to a limited set of content (such as information and culture) and allowing competition on the content marketplace. It could then concentrate on regulating a balanced distribution of advertising revenues among different media and different players. This solution would allow players more freedom of enterprise and ensure real competition, thanks also to the decrease of entry costs to the media market, once the infrastructures begin to be set up. The balance of the system should be guaranteed by a sort of regulated competition, based on the public control of infrastructures’ universal service, as well as on the existing anti-trust and freedom-of-information laws and norms. On this

last point, the multiplication of players and channels evidently benefits from wider access to the content market, as witnessed by the wide network of news/information blogs on the Web and by the phenomenon of “citizens’ journalism.”

In conclusion, concrete difficulties and many stumbling blocks undoubtedly await us on the road to a European governance of the new media system. Nevertheless, opinion is largely united behind a Europe-wide harmonization of the normative framework regarding the infrastructures and media content needed to strengthen European culture without obstructing the development of local cultures.

NOTES

¹ The authors want to thank Anna Sfardini and Simone Carlo for their valuable collaboration in the composition of this chapter.

² This is witnessed by the efforts of the researchers and historians of the Massachusetts Institute of Technology engaged to rethink the media change. See Gitelman and Pingree, 2003; Jenkins and Thornburn, 2003a and 2003b; Jenkins, 2006; and Gitelman, 2006.

³ This model is proposed by Colombo and Carlo, 2007.

⁴ Since the early 1990s the discussion on media pluralism has played an important role within the European Union. It started in 1992 with the consultation on the Green Paper “Pluralism and Media Concentration in the Internal Market: An Assessment of the Need for Community Action” and was developed in the issue papers and during the audiovisual conference in Liverpool (September 2005). Meanwhile the European Parliament has continued to show concern over a number of resolutions. See Klimkiewicz, 2006.

⁵ On the initiatives, research groups and documents concerning the issue of media pluralism/concentration, in particular from the Council of Europe perspective, please refer to Jakubowicz, 2006b.

⁶ In 2004–2005 the Italian government offered €150 to consumers purchasing a DTT decoder. In some cases the incentive covered the whole cost of the decoder.

GLOSSARY

DSL (Digital Subscriber Loop or Digital Subscriber Line) is a transmission technology that distributes data (e.g., Internet services) via local telephone network.

DTT (Digital Terrestrial Television) is a standard for digital broadcasting television that uses aerial broadcasts. Thanks to the digital transmissions, *DTT* allows a better quality of sound and picture and the possibility to increase the number of broadcast channels. *DTT* is received via a new digital set-top box.

FTA (Free-to-Air) is a kind of television and radio digital service that may be received without subscription and for free.

DTH (Direct-To-Home) is a kind of television satellite service that allows the reception of analog or digital programs with a small dish antenna and a decoder.

IpTV (Internet Protocol Television) is a television cable service that allows the reception of digital programs (in particular on-demand) via Internet broadband connection.

Mobile TV is a television service distributed to subscribers via mobile telecommunications networks.

CHAPTER 13

The Link That Matters:

Media Concentration and Diversity of Content

ZRINJKA PERUŠKO

13.1. Introduction

In today's information societies, the media are increasingly viewed as part of the service economy. They provide jobs and revenues, and they have strong lobbies against any policy that might reduce their profits, enhanced by integration tendencies that lead to market concentration. In addition to valuing the media's role in the new information economies, many governments still value the political and social role of the media, the success of which is based on diversity and pluralism.

The relationship of media market concentration and media diversity and pluralism is a complex topic of contemporary European media policies, where pluralism of the media is seen as the main public goal for the media sector, relating to political aims like deliberation, participation, and democracy, as well as to social aims like social cohesion and cultural diversity. Media pluralism is usually seen to be threatened by media concentration trends of the media markets at national, regional, and global levels. This perceived threat has spurred much policy-oriented debate (and some policy) in the European Union, and more actual policy within individual European countries. It has also instigated significant research (both by policymakers and by independent research agencies) aimed at showing the relationship between media concentration (or, more precisely, the characteristics of the media market) and media pluralism and diversity (defined in various ways, from diversity of ownership to diversity and pluralism of content-output).

Still, all the efforts at serious transnational regulation of media concentration are based on one point: the evidence of the negative influence of media concentration on media pluralism and diversity. The relationship (or its negative consequences) is often discounted

by media groups, and policymakers sometimes take refuge in the “not proven” verdict to delay making decisions that might curtail market developments in the media sector.

In this chapter I show what evidence of the relationship already exists and point to the lacunae of research in view of future policy action.

13.2. Policy-triggered or commissioned research

One of the first comprehensive efforts to look for evidence of the relationship was instigated by the Council of Europe Committee of experts on media concentrations and pluralism (MM-CM). MM-CM commissioned Gillian Doyle to review the existing studies and literature in order to “assess whether, on balance, media concentrations have a positive or negative impact on pluralism” (Doyle, 1997). In economic terms, concentration is a characteristic of a market in which the competition of companies is constrained to different degrees. The extreme example of concentration is a monopoly, in which access to a given market is totally barred. Even though we usually link the concept of media pluralism and diversity with the concept of market concentration as the main threat, what we are really speaking about are the different aspects of market shape or issues that can lead to problems with competition, or, framed in political terms, problems of excessive control over the media.

“For the purpose of the study,” writes Doyle, “media pluralism should be understood as diversity of media supply, reflected, for example, in the existence of a plurality of independent and autonomous media and a diversity of media contents available to the public” (Doyle, 1997). In the study, completed in 1997, Doyle points to the complexity of the relationship of media concentration and media diversity and pluralism. Doyle lists the variables that influence the levels of pluralism in any media market:

- the size or wealth of the market;
- the number of separate and autonomous suppliers;
- diversity/heterogeneity in output of media;
- consolidation of editorial or other functions/resources (Doyle, 1997, p. 7).

Both the diversity of suppliers (ownership) and diversity of output (content) will depend on the strength of the market and on the resources invested in the media. As the media operate both within the economies of scale and of scope, the relationship between diversity of ownership and diversity of content will depend on the possibilities for media companies to maximize cost-efficiencies that allow the greatest profits. Doyle further examines the economic ramifications of pluralism and diversity of content. She finds that pluralism is always at risk when the media engage in editorial sharing of products or sources, whether within the consolidated media company (with the same owner) or between competing companies. Doyle also quotes incidences of adverse influence of the owners on media content.

This finding is supported by the 2003 OSCE study “The Impact of Media Concentration on Professional Journalism,” which analyzes the results of a survey of newspaper journalists in eight countries in Eastern and Western Europe (OSCE, 2003). The data shows that 25 percent of the respondents think that advertising influences the editorial line of their newspaper (p. 74). Additionally, 27.3 percent of the respondents think that economic revenue is very important for the editorial line of their paper, and 20.2 percent think that good relations with the business community are very important. At the same time when economic influence is freely admitted, any kind of political loyalty is discounted by the journalists. This fact alone should warrant policy action on media transparency and public accountability.

The adverse influence of the owners on program content has, in our experience in Central-Eastern Europe, often materialized when the state had monopoly ownership of the media. Application of Article 10 of the European Convention on Human Rights against media monopoly was used early on in a case of state monopoly. The European Court of Human Rights ruled in 1993 against Austria’s state monopoly in television, stating that fear of a private television monopoly is not sufficient justification for retaining a state monopoly.¹ Where media are mostly privately owned, the fear of too much power in a single company or media owner to influence the public agenda is the reason for our equating media pluralism with media owners’ diversity.

Doyle quotes a U.S. study that finds that “in an advertiser-supported broadcasting economy with a limited number of channels, there will be a tendency towards duplication rather than diversity in programming

schedules” (Doyle, 1997, p. 8). Humphreys (1996) similarly describes the cultural homogenization and standardization of media output as a result of concentration, because all of the media use the same strategies to attract the audiences. Einstein (2002) shows a diminished programming quality in entertainment programs on U.S. television after recent mergers. A European study at approximately the same time was commissioned by the European Parliament on cultural diversity in European media programs. Undertaken by Maria Teresa La Porte Alfaro and Teresa Sabada, it investigated the impact of globalization of the media industry by examining the ownership of the media, media content, and media distribution channels (European Parliament, Directorate General for Research, 2001). The study includes the EU members prior to the 2000 enlargement. It concludes that in the audiovisual sector the vertical concentration of television and related production and distribution companies increases the risk of the lack of pluralism of content. The study further finds that the cultural values present in the highest audience programs in the 1995–2000 period are domestic, i.e. not imported; this finding is seen as positive.

The final finding in the 1997 study is that “Although diversity of ownership will not guarantee diversity of output, the existence of a diversity of suppliers will still contribute positively to pluralism. Even if all suppliers choose to rely on or share many of the same sources of content, their rivalry will promote a culture of dissent which is healthy for democracy” (Doyle, 1997, p. 32). Ten years later, after a research study commissioned David Ward to look for the relationship between concentration and media diversity, the link is still not considered to be proven. This study, though structured differently than the Doyle study, had a similar aim: “the assessment of content diversity in newspapers and television in the context of increasing trends towards concentration of media markets” (Ward, 2006). The data were collected on genre diversity of television, and content analysis was performed of actors, subjects, and topics covered in newspapers and television news. The study was performed in four countries (Italy, Norway, the United Kingdom, and Croatia), in order to find out if the different levels of market concentration would show related diversity and pluralism in media content. Ward finds that the “data on content diversity collected for this report does not indicate a strong link between concentration of markets and the diversity of content. Markets that are

strongly concentrated can demonstrate similar levels of content diversity as markets that are less concentrated” (p. 4). This study did not take into account the size of the market (in terms of advertising revenues), or media policy supportive of diversity and pluralism, which could account for the content diversity found in the study.

The Ward study points to an important role of policy: Where no positive regulatory obligations are imposed on commercial television broadcasters, the number of programs of a high social value is slim, as is the investment in domestic production. This again proves the importance of policy in ensuring the social role of the media.

The Ward study concludes: “The study could not identify a direct link between media concentration (structural and market) and content diversity and pluralism in quantitative terms. This is not to conclude that there is not a link between concentration of ownership and content diversity. However, such a direct relationship is not evident in either the diversity of content of newspapers or on television channels over the monitoring period in quantitative terms. Other factors such as resources, size of markets and regulatory obligations are also key factors in determining the range of programming” (Ward, 2006, p. 4). Present activity is aimed at devising a methodology for monitoring of media concentration and media pluralism at a pan-European level.

Concerns for the freedom and pluralism of expression in the local media (especially radio), given increasing commercialization, were voiced in the European Union as early as 1984.² The European Parliament stressed the need to protect and promote media pluralism and to control media concentration. The concern for media pluralism, viewed as a key characteristic of media in a democratic society, is also behind the 1992 European Commission Green Paper on Pluralism and concentration in the internal market (European Commission, 1992). Although this paper and its follow-up³ proposed further legislative action to protect media pluralism, and ideas were even entertained about an intercontinental world broadcasting conference where ownership concentration would be discussed and regulated, no further action on harmonization was taken at that time. The data from the study was, we must conclude, not taken as a proof of the detrimental influence of media concentration on media pluralism, especially not to warrant any action at the European level. The recent activity of the Commission on the commissioned research study “Indicators for Media Pluralism

in the Member States—Towards a Risk-Based Approach”⁴ supports my conclusion that the relationship is still understood in these quarters as “not proven.” The Commission seems to have taken a further step away from proving the relationship by focusing on the issue of pluralism instead of on the issue of media ownership concentration in relation to it. We will see quite soon what this strategy will produce.

13.3. What is media pluralism?

One of the problems in investigating ramifications of concentration on media pluralism is a lack of a proper definition that can be operational for empirical research. Media pluralism as a concept is still not defined in most of the European countries (Council of Europe, MC-S-MD, 2007)⁵, nor at the European level. Iosifides (1997b) shows that in the 1992 Green Paper, media pluralism was also not defined and is used interchangeably with pluralism of the press, pluralism in the press, pluralism of information, and pluralism of expression of ideas (Iosifides 1997b, p. 86). In 2005 the final report of the Liverpool Audiovisual Conference, the origin of the present effort of the Commission to define indicators of media pluralism, states, “Perhaps the main subject is a matter of definition, or what do we mean by ‘media pluralism’ and whether in each culture/country it can have a different meaning [...]. In the same way, about the role of the EU in this definition, and that we have had the proposal of how to define ‘pluralism’ more precisely in order to decide which instruments are relevant to handling issues in an adequate way. New Member States tended to have different notions of what pluralism means than the older members of the Union. There is a danger of applying double standards when dealing with pluralism issues.” (Department for Culture, Media and Sport, 2005)

The Commission Staff Working Paper “Media Pluralism in Member States of the European Union” (European Commission, DG Information Society and Media, 2007a) describes, but does not define, media pluralism in the following way:

“Media pluralism is a concept that embraces a number of aspects, such as diversity of ownership, variety in the sources of information and in the range of contents available in the different Member

States. For many analysts or observers, media pluralism has come to mean, almost exclusively, plurality of ownership. Concentration of ownership, it is feared, may result in a skewed public discourse where certain viewpoints are excluded or underrepresented. Further, because some viewpoints are represented while others are marginalized, abuse of political power can occur through the lobbying of powerful interest groups—whether these are political, commercial, or other” (European Commission, DG Information Society and Media, 2007a, p. 5).

Today only a minority would define media pluralism only through diversity of ownership. Many research studies (also described here) have pointed out that diversity of media owners does not necessarily produce diversity and pluralism of media output.

At the international level, the IREX Media Sustainability Index (IREX, 2003) provides an example (among many similar endeavors, see UNESCO, 2007b) of the definition and research into media pluralism. In composing the index a panel is used in each country, asked to judge five main criteria or objectives of independent media sustainability. “Plurality of news sources: multiple news sources provide citizens with reliable and objective news,” is among them. This criterion is composed of seven variables:

- “plurality of affordable public and private news sources (e.g. print, broadcast, internet) exists;
- citizens access to domestic or international media is not restricted;
- state or public media reflect the views of the entire political spectrum, are nonpartisan, and serve the public interest;
- independent news agencies gather and distribute news for print and broadcast media;
- independent broadcast media produce their own news programs;
- transparency of media ownership allows consumers to judge objectivity of news; media ownership is not concentrated in a few conglomerates;
- a broad spectrum of social interests are reflected and represented in the media, including minority-language information sources.” (IREX, 2003 p. xxiii)

In this we find pluralism to include: a) plurality/diversity of media suppliers; b) freedom and affordability of access; c) content pluralism and diversity of ideas, as well as quality of content (i.e. public interest); d) diversity of news sources; e) independent and not concentrated editorial practices for news; f) diversity and transparency of media ownership; and g) cultural and social diversity in media programs and ideas represented in the media.

At the level of media output or media content, we can speak of internal and external pluralism. Internal pluralism usually pertains to public service television and radio or a generalist type of television channel that includes different program genres within one media channel. This is opposed by external pluralism or pluralism at the level of the media system in which diversity and pluralism of opinion is not sought at the level of programs/channels, but is assumed by the independence and autonomy of diverse media types. In external pluralism, a media system could be diverse and plural even if all of the individual media had a single topic, or single ideology. Donsbach (1996) calls this virtual pluralism, as one would have to partake of many different media before a diverse and plural view of ideas and culture could be gained. A stream of research focused on the quality of programming content showed a higher level of (internal) diversity for public television channels, while the lowest results were scored by American commercial television networks (Ishikawa, 1996). The findings on the relationship are not conclusive, as repeated analysis in Sweden showed that "in the presence of increasing competition from commercial channels, Sweden's public service television system increased its diversity, while her public service radio system decreased in diversity" (Hillve et al, 1997). This area warrants further research as well.

Media pluralism in relation to media content is often called media diversity. Jan van Cuilenburg defines media diversity as "the extent to which media content differs according to one or more criteria" (2007, p. 27). He describes four levels at which media diversity can be studied: a) units of content (like newspaper articles or individual programs), where the diversity of opinions are studied; b) content bundles like television channels, where the study is program content supply within one media (i.e. genres or program types); c) at the level of one media type (i.e. program content in television, etc.); and d) at the level of the total social communication system (van Cuilenburg 2007,

p. 28). Van Cuilenburg (2007) uses the concept (after Hellmann) of open media diversity and reflective media diversity, as two normative benchmarks to empirically measure a society's media diversity. He places them in a mutually exclusive relationship: the more reflective diversity in a media system, the more media included in the system in a fiercer competition and the less openness diversity, i.e. equitable presentation of different social and political ideas in the media. Van Cuilenburg finds this hypothesis empirically valid after a Dutch television market study and collaboration from Germany. Both studies show that the "relationship between media competition and diversity and quality is far from linear and positive" (2007, p. 41).

The study *Concentration and Diversity of the Dutch Media 2002*, published by the Dutch Media Authority (2003), is one of the most comprehensive policy-generated studies attempting to link concentration of the media and the diversity of its output, based in principle on the above ideas. This study introduces two concepts for evaluating content diversity, i.e. reflective diversity and openness diversity. Reflective diversity is a measure of the "extent to which media content matches the preferences of media users" (Dutch Media Authority, 2003, in Annex). In other words, it is the degree of similarity of audience share/viewing time for different program types (i.e. news and information, fiction films, drama, etc.) and the share of that program type in the overall programming of a certain channel or broadcasting company. The study proposes that the better the "fit" between the proportion of the program type in the broadcast (television) program and audience viewing times of such programs, the better the media serves the public's needs. This would seem to support the thesis of a new communication policy paradigm proposed by van Cuilenburg⁶ and McQuail (2003). The paradigm holds that the satisfaction of citizen/consumer communication needs will replace as the criterion the former public service media policy paradigm, which was based on normative principles and socio-political considerations of aims and values for the media. Thus the satisfaction of citizens/consumers (as shown in the reflective diversity of the media) is replacing any socially determined media value (shown in openness diversity). The satisfaction is, in this instance, equated with user-behavior. At the same time, the behavior of the mass-media audience has become the positive norm of evaluating media behavior. This must be viewed as a Copernican shift in media policy theory.

13.4. Conclusion

Let us review different findings from (mainly) policy-triggered research into the impact that different levels of competition (or concentration as the other side of the coin, which is more often used in media policy talk but less in the market research itself) can have on media landscape (and sometimes will have, but we are not able yet to predict precisely when and how) on the pluralism and diversity of the media programs and content. The following negative effects are found:

- diminishing of choice and diversity in the number of titles or outlets;
- mainstreaming of the remaining titles in order to maximize audiences;
- editorial concentration, a practice of “diversified” media conglomerates: media content is produced in one central place and distributed to local audiences—lowers diversity of opinion;
- negative effects on programming quality (lowest common denominator and reduced investments);
- standardization of cultural content in the media;
- influence of owners on content;
- influence of advertisers and other economic interests of the media on content.

Although a great deal of evidence suggests that certain kinds of market shapes impede media diversity and pluralism, we still lack a systematic insight into all of the aspects of the relationship. In terms of positive social scientific research methods, we can look for two kinds of relationships. One would be causal, where we would look to prove that media concentration causes diminished diversity and pluralism of media output in terms of content. A causal relationship is, however, almost impossible to prove in relation to a social development with so many variables that we cannot account for. For instance, it has already been highlighted that the size of the media market and the size of the population are a factor in the number of media that can survive (i.e. structural diversity at the level of media outlets). We are not sure if political or cultural traditions (like the habits of reading more newspapers

or watching more television) play a role, and if so, what kind of role. Thus we cannot expect to prove definitively that media concentration lowers pluralism (i.e. the fewer media and media owners in a market, the less diversity of media content on offer).

The second relationship would be one of correlation, where we would expect to show that media concentration and low diversity and pluralism in media content occur at the same time and in the same market. We would take this co-occurrence to show a link; we could not, however, prove positively what the influencing factor in the development is. Is it the concentrated media market itself? Are the practices of editorial integration or loss of independence in production the main culprits (and are they the result of concentration)? Or is the reason for low diversity of content to be found in audience preferences (based on the assumption that today's audiences are only interested in one thing: entertainment)? We could even turn the proposition around and assume that the reduced pluralism and diversity of content drives the integration of the media (although this would be very far-fetched and a thesis not yet put forward as defense for media concentration). In summary, it is almost impossible to prove the relationship with a one-off empirical research design, which can only provide us with a snapshot in time. It would be like taking a photograph of a high-jumper and expecting to understand from it how high he would go before landing. A much better understanding would be gained by a video clip, showing the full jump and including the running up to it, the crouch before it, the jump itself and the landing.

The worldwide trend of media concentration in recent decades has been well-documented (Bagdikian 2000, AP-MD 2003, 2004). The best way to look for the proof is with panel data that would show us trends of developments in the market shape and the level and type of content diversity over time. In this way, we could invoke the *post hoc ergo propter hoc* not in terms of a logical fallacy to prove the causality, but to show that when market influence becomes more and more concentrated, the content of the media (as well as media ownership, which is the first diversity to go) becomes less and less diverse and plural. This research should also include the important role of media and cultural policy. Previous studies show that the relationship between competition/concentration and diversity is not linear. The outcome is influenced by at least two other variables: the strength of the market

and the influence of media policy. An examination is necessary of those markets where the media are concentrated yet have diverse content. Those markets/societies hide an intervening variable, probably policy measures helping protect and promote pluralism and diversity.

We should also start examining a much more troubling notion, that commercialism in the media has reached such proportions that the quality of the programming is becoming irreparably worse. This is not to say (at least not yet) that commercially based media are intrinsically bad for pluralism and diversity. On the contrary, in Western Europe diversity was provided on a grand scale by private (pirate) radio in the 1960s and 1970s, by private (commercial) television in the 1980s, and in the entire mediascapes in the 1990s in Central and Eastern Europe (Peruško and Popović 2008). In most of the world, the governments are still the majority owners of the media: in ninety-seven countries the state owns 29 percent of the printed press, 60 percent of television, and 72 percent of radio stations (World Bank, 2003). However, there is real concern about the future public role of the media and the role of commercialism in it. “Commercialism refers to the pursuit of profit as a primary goal, while non-commercialism in the media is associated with pluralism, diversity, and all kinds of public interest obligations that are often at odds with the profit motives that are inherent in the market-oriented model” (De Bens 2007, p. 9). We should insist that continued quality in media programs, defined as pluralism, diversity, and public interest content, is promoted and assured by European and national media policies.

NOTES

¹ European Court of Human Rights, *Informationsverein Lentia and others*, judgment of November 24, 1993. Series A No. 276, paras. 32–33 and 38–42. Quoted in DH-MM (94) 8.

² Resolution on Broadcast Communication in the European Community (The Threat to Diversity of Opinion Posed by the Commercialization of New Media), O.J. 14.05.1984 C 127/147.

³ Follow up to the Consultation Process Relating to the Green Paper on “Pluralism and Media Concentration in the Internal Market—An Assessment of the Need for Community Action.” COM (94) 353 Final, Brussels, 5.10.1994.

⁴ Available at http://ec.europa.eu/avpolicy/info_centre/tenders/archives/index_en.htm#pluralism, retrieved March 3, 2008.

⁵ According to the survey of Member States based on the Questionnaire on Methodology for the Monitoring of Media Concentration, Pluralism and Diversity, conducted by the Group of Specialists on Media Diversity of the Council of Europe in 2007.

⁶ J. van Cuilenburg is also chairman of the Dutch Media Authority.

CHAPTER 14

Developing the “Third Sector”:

Community Media Policies in Europe

KATE COYER AND ARNE HINTZ

14.1. Introduction

The phenomenon of community media is not new to Europe. But recognition of community media as a formal “third sector” of broadcasting is emerging on the policy radar, as pressure for states and international bodies to expand, support, and develop sectors for “citizen” access to broadcasting continues to grow. Though specific definitions of community media vary, the concept generally refers to self-organized, participatory, not-for-profit media that address local geographic communities and/or communities of interest. Community media challenge traditional conceptions of a dual media system, suggesting instead a three-tier media landscape that includes public service, commercial, and community media.

Communicative rights, including access to information and freedom of expression, are at the heart of democratic societies. An essential component of these rights is the ability to create one’s own media independent of government or commercial pressures. Alternative forms of media, whether political or culturally radical, or modes of contesting dominant media paradigms and ownership structures, are necessary ingredients for media democracy (Coyer, Dowmunt, and Fountain 2007). Community media are one such alternative mode of communication, whose mission lies in its independent and participatory nature.

Community media are responding to several media-related as well as political challenges:

- 1) Media pluralism. Community media are one of many responses to concerns over increasing concentration of media ownership, economic and political control over vital communication

resources and infrastructures, and the need for diversity of content and opinions in the media. Commercialization and lingering state influence and control have also placed pressures on public service broadcasting. Complementing public and commercial media systems, community media have sought to create spaces to broaden public debate, inject a local and neighborhood voice that is often neglected in an increasingly nationalized and globalized media landscape, and offer an alternative to what is often criticized as homogenized, commercial culture. By ensuring that media production does not remain solely in the hands of large-scale institutions, community media remind us that media pluralism is not just about plurality of content but plurality of content producers and of owners.

- 2) Active citizenship. A decline in trust, confidence, and participation in the political system has led to concerns over the necessary renewal of democracy and citizenship. Community media have a long history of activating citizens and facilitating participation. The founding principles of these projects are typically based on openness and participation, as well as the direct involvement of local communities and marginalized groups such as migrants and young people. Community media organizations are thus spaces where the very issues and principles that compose a democratic society are being played out, explored, and experienced.
- 3) Media policy advocacy. Community media advocates are emerging as significant actors in media reform movements and efforts to orient policy environments towards more democratic normative and legal frameworks. Networks of cooperation are increasing, designed to facilitate cross-border linkages between community media projects. Activists and civil-society organizers are partnering with academics and sympathetic policymakers with the aim of intervening in policy processes.

The European policy agenda increasingly recognizes the role of these media, and debates have begun within the Council of Europe and the European Parliament on how to develop enabling regulatory frameworks. However, the policy environment for community media in Europe remains sketchy and inconsistent. While some countries have developed promising regulations as well as a sophisticated understanding

of the policy needs for sustainable community media, others continue to disregard their very existence. According to AMARC, the World Association of Community Broadcasters, “the lack of proper enabling legislation is the single principal barrier to [community media’s] social impact” (AMARC, 2007, p. 5).¹ In this chapter we wish to outline the European regulatory context as it concerns community media, and specifically community broadcasting. We will analyze the further trajectory of the developing policy environment in Europe. First we will seek to define community media and explain their role in the media system, then we will look at policy processes on the EU level, and finally we will point to several different national regulations.

14.2. Defining community media

A recent study commissioned by the European Parliament defines community media as “media that are non profit and owned by or accountable to the community that they seek to serve. They are open to participation in programme making and management by members of the community” (European Parliament, 2008, pp. 9/14). Other definitions link the emergence of such media to an alternative media framework. Howley (2005, p. 2) describes “grassroots or locally oriented media access initiatives predicated on a profound sense of dissatisfaction with mainstream media form and content, dedicated to the principles of free expression and participatory democracy, and committed to enhancing community relations and promoting community solidarity.”

Community media are a broad category of media structures across different technological platforms (print, radio, television, Web-based or mixed media), operated for and by (and/or accountable to) a community (which can be a community of interest, a geographical community, or a cultural community) and are characterized by the effective participation of that community in all processes of the organization. They have been described using a variety of concepts, including citizens media, alternative media, free media, autonomous media, radical media, and civil society media. The formal policy sectors themselves go by different names, including associative media, open media, access media, and local public media. However, the term “community media” is generally accepted as a way to conceptualize and develop policy

frameworks in support of participatory citizen-based media projects. Each of these concepts emerges from different political, cultural, and social orientations and thus reflects the specific landscape in which it is situated. Community media is hybrid in its forms and is “shaped by its environment and the distinct culture, history and reality of the community it serves” (Buckley et al., 2008, p. 207).

Over the past decade, research interest in the subject has grown. Several publications address the value of community media from different conceptual backgrounds, including Downing, 2001 (radical media); Rodriguez, 2001 (citizen media); Atton, 2002, and Couldry and Curran, 2003 (alternative media); Howley, 2005; Jankowski and Prehn, 2002; Rennie, 2006; Bailey, Cammaerts, and Carpentier, 2007; and Coyer, Dowmunt, and Fountain, 2007. Global academic networks (such as OURMedia) and associations (International Association for Media and Communication Research IAMCR) increasingly offer recognition to these entities and spaces for relevant discussion.

Across these studies, certain core characteristics of community media have emerged:

- civil society ownership: ownership and control are ultimately in the hands of self-organized and independent citizens’ groups, associations, or organizations; non-profit entities;
- participation: access for individuals who are not professional media makers to get involved in media production and organization, thus breaking the boundaries between active producers and passive consumers;
- democratic structures: transparent and open decision-making; governing bodies are representative of the community they serve; collective decision-making is often favored over hierarchical structures;
- volunteer-driven: skill-sharing, individual and collective empowerment, and capacity-building play a central role in the mission and purpose; training is seen as key to both sustainability and personal development of volunteers;
- “alternative” content: community media give voice to groups, ideas, and cultures not always represented in mainstream media; they facilitate community-level debate and information sharing, and support the participation of marginalized communities in political, social, and cultural processes.

These characteristics may be evidenced to different degrees, depending on the specific project. But they best represent the overall motivations (and in some cases aspirations) of locally owned and operated, small-scale community media projects. Community media "are located in isolated rural villages but also in the heart of the largest cities, and the communities they represent and serve may be geographically defined as the residents of a given town, or they may be defined by shared cultural, linguistic, or other interests" (Buckley et al., 2008, p. 207).

The "social gain" value that is derived from community media activity and identified in a number of empirical studies includes social cohesion, the strengthening of community identities and inter-community exchange, media pluralism and media literacy, provision of crucial information such as on health and the environment, promotion of local cultures, and cross-cultural dialogue. Community media offer platforms for civic engagement and for citizens to play an active role in community life, as they act as a catalyst for a diversity of activists, artists, and civil society organizations. They have been called a "significant component of participatory democracy" (European Parliament, Directorate General Internal Policies of the Union, 2007, p. 5).

However, as citizen initiatives without large-scale institutional support, they face serious challenges with regards to financial sustainability, access to communication infrastructure (such as spectrum allocation, positioning in the transition to digital broadcasting), and national legal frameworks. Community media are often not recognized as distinct media. More qualitative and quantitative research is needed to assess the impact of community media, including evaluation criteria and the development of research methodologies, and comparative policy studies that explore community media's access to, for example, the radio spectrum and other infrastructural resources.

14.3. Why all the fuss about a few small neighborhood radio stations?

In an era characterized by digital media, some would argue that there is no need for enabling legislation in support of policies and infrastructures for community media. Many see the Internet as a viable alternative for spectrum scarcity that has left many would-be projects devoid

of access to the airwaves necessary for traditional analog broadcast on FM, medium-wave radio or television. However, community media advocates argue that we cannot expect our digital futures to automatically offer access to media forms that are not adequately given space in the analog present (Tridish and Coyer, 2005). Thus, space must still be created and fought for on analog platforms, such as FM radio, to ensure that community media are part of the digital transition. Experiences in the United States have shown that the transition to digital radio will not bring opportunities for new entrants to the market. Rather, incumbent broadcasters gain access to increased spectrum and new channels within the same ownership regime. Participants at a European Science Foundation exploratory workshop on the impact of digitalization on community broadcasting held at Central European University in 2008 concluded that, besides exploring inclusive and enabling digital platforms, focus should remain on gaining access to the FM bandwidth. One-hundred-year-old technology continues to matter and continues to be a viable and necessary space for local, grassroots media production and reception.

However, incumbent broadcasters have repeatedly resisted the entry of new “non-aligned” stations into broadcast markets (Coyer, 2006). In the United States, both the commercial broadcast lobby *and* National Public Radio continue to fight the expansion of low-power FM radio that would make existing space on the dial available for non-commercial, independent voices. Their arguments center on claims of broadcast interference—concerns that have been rejected by the Federal Communications Commission and by a congressionally mandated study (the MITRE Report). In Britain, incumbent resistance also came from local commercial radio operators and initially from the BBC as well. The BBC has since offered support for the sector, and there are numerous examples of program partnerships between local BBC Radio stations and their neighboring community radio station. The commercial radio lobby, however, was successful in convincing the national communications regulator Ofcom to enact some advertising limitations on community stations in small markets.

Resistance to small-scale neighborhood radio stations betrays more than just technological considerations related to allocation of frequency or financial resources. Rather, it speaks to concerns over the decentralization of national media systems; market-driven priorities

taking precedence over community needs; a focus on privatization and economic liberalization at the expense of not-for-profit sectors; and the inherent difficulties of developing truly independent and meaningful public service broadcasting. Other reasons for states not to make the development of community media a priority include the view that community needs can be taken care of through existing private channels and local programming obligations; the concern that there is no audience for these media; and a lack of pressure from grassroots organizations and would-be community broadcasters. (The latter is especially evident in the former communist countries, where there may not be models for sustainability or volunteerism related to running a radio station.)

The development of community broadcasting has been most successful where pressure has been strongest from both grassroots activists and pirate (“unlicensed”) radio broadcasters who used strategies of direct action to push for access to the airwaves. Pirates have also been instrumental in breaking apart national monopolies, be they state or public service. Evidence of this can be seen in Britain, France, Austria, Belgium, Germany, and Hungary, to name only a few European examples. Development of community media is thus linked with measures to decentralize media systems in general.

14.4. Policy at the European level

14.4.1. A puzzle of policies

Because state-level regulation varies widely throughout the European Union (EU), a concerted effort to create an enabling regulatory environment is largely missing. Media policy remains the responsibility of national authorities. However, a number of EU regulations acknowledge the importance of vital community media concerns, such as media pluralism, freedom of expression, and cultural diversity, and they relate directly or indirectly to the existence and potential development of community media across Europe.

Within EU telecommunications regulation, for example, there are directives to ensure non-discriminatory spectrum allocation (Directive 2002/20/EC)² and to strengthen universal service and “must-carry” rules (Directive 2002/22/EC).³ EU audiovisual regulation emphasizes

the importance of media pluralism and diversity,⁴ and the European Parliament has called for access to the media for all societal groups (EP resolution 2003/2237[INI]).⁵ EU policies on freedom of speech and culture highlight local creativity, local culture, and the opportunity for everyone to participate in public discourse. EC Communications also stress cross-cultural dialogue and the protection of minorities (Communication COM [95] 653).⁶

Thus a number of EU policies are concerned with aspects that are at the heart of community media practices, yet community media have rarely been explicitly recognized. Amongst the relevant European policy institutions, only the Council of Europe has, so far, acknowledged that community media constitute “a third sector, supplementing the national public service and the private broadcasting sector.” The Council recommends, “Member States should encourage the development of other media capable of making a contribution to pluralism and diversity and providing a space for dialogue. These media could, for example, take the form of community, local, minority or social media.”⁷

14.4.2 Emerging policy interest

However, further interest in community media among European policymakers is starting to emerge. In 2007, the European Parliament published a study entitled *The State of Community Media in the European Union* (European Parliament, Directorate General Internal Policies of the Union, 2007). In it the authors confirm the characteristics of community media identified by academic observers (mentioned above) and highlight community media’s contribution to core European objectives such as social cohesion, media pluralism, and cross-cultural dialogue. They emphasize community media’s democratic role, which enhances civic engagement, and note: “If society’s future relies on the active involvement of informed, media literate citizens community media can play a definitive role in facilitating such a future” (ibid., p. iv).

The report further recognizes that EU institutions increasingly wish to enter into a dialogue with local and regional communities regarding European affairs and stresses that the local nature of community media provides an excellent opportunity to generate this conversation.⁸ Overall, community media are presented as a “dynamic and

highly diverse part of the European Union's media landscape" (ibid., iii). The report thus calls for legal recognition of community media in media law, access to licenses in both analog and digital environments, and financial support for the sector.

Another report was recently commissioned by the Group of Specialists on Media Diversity within the Council of Europe. The study *The Role of the Media in Promoting Social Cohesion with Particular Reference to Community, Local, Minority and Social Media* notes that public service and commercial media are increasingly unable to meet the needs of marginalized and disadvantaged social groups in Europe. The report concludes that community media are an "important factor in social cohesion and citizenship, particularly for minority ethnic communities and refugee and migrant communities" (Lewis, 2007, p. 3), and are equally important for the broader public by linking up diverse parts of the population, and the long-term impact of media literacy and training efforts. The report urges European policymakers "to create legislative infrastructure without which community media cannot develop" (ibid.), to "ensure that community media are not disadvantaged in the digital environment" (ibid.), to commit funds to support the sector, and to establish a community media observatory for policy monitoring. And the report underlines the current momentum both in the development of community media and in the interest of European policymakers.

14.4.3. Community media as policy actors

This momentum is underlined by the emergence of European advocacy networks by and for community media. The Community Media Forum Europe (CMFE) was created in 2005 as a network of experts and practitioners to coordinate policy advocacy for community media. In 2007 it was officially established as a non-governmental organization and has developed into a broad European network with membership of many national community media federations. It first appeared publicly at the 7th European Ministerial Conference on Mass Media Policy, a conference organized by the Council of Europe and taking place in March 2005. Since then it has engaged in consultations with the European Commission, and it enjoys an observer status with the Group of Specialists on Media Diversity within the Council of Europe.

The CMFE has thus emerged as the voice of community media in the European policy space.

In addition, AMARC Europe—the European chapter of the World Association of Community Broadcasters—was re-created in 2006 and has joined the CMFE as a representative of community media. Both associations collaborate closely and have overlapping membership. AMARC also engages in consultations with the International Telecommunications Union (ITU) on policy that concerns broadcast infrastructure.

Through efforts like these, community media increasingly participate in so-called multi-stakeholder approaches to policymaking, i.e. the involvement of different stakeholders in policy deliberations, including business and civil society (Hemmati, 2002). This approach has become increasingly prominent in the negotiation processes towards the WSIS and also in follow-up policy fora, such as the Internet Governance Forum (IGF).

14.5. Policy snapshots

14.5.1. Comparative frameworks

The strongest policy focus with regards to community media has been on community broadcasting. While community *media* (broadly speaking) require an enabling environment to flourish, community *broadcasting* requires actual allocation of broadcast spectrum and a licensing regime that offers the opportunity for community-based groups to gain access to the airwaves. Though examples of well-established community television sectors exist in countries like the Netherlands, and that sector has grown in the United Kingdom, this section will focus on licensing for community radio.

Community broadcasting has developed asymmetrically across Europe at different times and under different conditions. Community radio is typically identified with Western European countries, where policies are most favorable for it (Ireland, France, the Netherlands). However, despite Britain's rich tradition of public broadcasting, it did not implement a community radio policy until 2004. In Germany community radio remains underdeveloped because responsibility over the organization of broadcasting lies with the states (*Länder*)—the

federal government regulates only international broadcasting.⁹ In Central and Eastern Europe, Hungary remains an exception, boasting the most widespread and developed community radio sector in the region. A more typical case is Slovenia, which lacks an enabling environment for community broadcasting per se. There two university radio stations serve as de facto community stations in terms of content, even though they have traditional organizational structures. Bosnia has a framework for licensing community radio, but the policy does not allow for any sustainable form of financial support (no advertising, no public support); thus, no one has taken advantage of the licensing opportunity. And in Croatia, a new civil society organization has been created to advocate the development of community radio there.

Across Europe, community radio stations fall roughly under one of the following frames:

- 1) well-established sectors with supportive policies, sustainable models that include strong state financial support (France, Netherlands);
- 2) well-established sectors with supportive policies, but minimal state financial support (the United Kingdom, Ireland, Hungary);
- 3) medium-developed sectors with some supportive policies but no state financing (Italy, Spain, Sweden);
- 4) under- or undeveloped sectors where there are limited or non-supportive policies and funding (Czech Republic, Croatia, Slovakia, Greece).

Where there are not any frameworks for licensing of community radio, stations with community-oriented sensibilities emerge either as pirates, community-minded commercial stations, student radio, or online media projects. History has shown, however, that community stations operating on commercial licenses tend eventually to be co-opted due to the economic value of the license. Thus, without protection or spectrum set-asides for not-for-profit community radio, the sector is not sustainable.

14.5.2 Policy snapshots

In this section, we focus on a non-representative selection of examples of community media policies and legislation from across Europe. Each

case focuses on a different policy aspect, such as funding (France, the Netherlands), social gain criteria (the United Kingdom), development of full power and low power sectors (Hungary), strong support for civil society representation (the Netherlands) and as distinctive “third sector” (the United Kingdom, Ireland), particularities of legislating community media in decentralized regulatory systems (Belgium, Germany), and systems lacking sufficient supportive legislation (Slovenia).

14.5.2.1. The United Kingdom

In Britain, following the success of a pilot project and twenty years of pressure from the Community Media Association (CMA), communications regulator Ofcom has issued 180 (at the time of writing) five-year renewable licenses for local non-profit organizations in a newly created sector for community radio.¹⁰ The legislation, as set forth in the 2003 Communications Act, has more to say about social policy than it does about broadcasting, as the sector has consciously been established as much more than “just” radio (Coyer, 2006). Vocal proponents included the then-Minister for the Department of Culture, Media and Sport; the Ministry for Lifelong Learning from the perspective of community radio’s potential for skill building, adult education, and esteem-building; and the All Party Community Media Group, whose chair argued that community radio is an integral part of community regeneration efforts.

Regarding licensing criteria, Ofcom outlined four required elements for consideration of long-term community radio licensing: social gain and access, programming, evaluation and measurement, and finance and ownership.¹¹ Specifically, applicants have to provide evidence of social gain and/or public service broadcasting; not-for-profit status; accessibility for people living within the area; training and community participation; and engagement with disadvantaged and underserved people and communities. Internet broadcasting was not deemed to be a priority, and the danger of obsolescence from digital radio was seen as far in the future, since digital radio still lacked a sizable audience, especially among the more economically disadvantaged and minority communities, who would likely be the last to gain universal access to new technologies.

The legislation takes an expansive view of community radio, providing for both communities of interest and of geography. For

example, there is Forest of Dean Community Radio, the only local station broadcasting throughout the Forest, a remote region in the west of Britain. There are also stations like Takeover Radio in Leicester, the first children's station in the UK, and Chorley Radio in Chorley, Leicester, serving gay, lesbian, and transgendered people there. In London alone, there is a licensed community station in West London serving the Punjabi-speaking population (Desi Radio); an experimental sound, art, and culture station in central London (Resonance FM); a station in East London seeking to provide access for many of the ethnic and minority-language-speaking people in the borough of Hackney, broadcasting in over fifteen languages (Sound Radio); and another East London station serving diaspora Africans (Voice of Africa Radio). Some stations also emerged from long-running community organizations, such as New Style Radio in Winston Green, Birmingham. New Style Radio is a project of the Afro-Caribbean Resources Centre (ACRC), itself formed in the 1970s as a cooperative for black youth that has grown into a significant community resource center. In his evaluation report of an earlier pilot project, Professor Anthony Everitt sites this broad approach as one of the strengths of the British model: "The growth of individualisation and 'active consumption' means that we tend to make opportunistic use of multiple communities to construct a confident, customised sense of ourselves, as distinct from defining ourselves in terms of a fixed community of which we are full paid up members" (Everitt, 2003a, p. 30).

These non-profit community radio licenses have a broadcast range of five kilometers (with wider reach for those applying for AM licenses). Stations may not be owned by individuals and must be held or incorporated as not-for-profit organizations. Community radio stations are allowed to receive up to 50 percent of their funding through advertising, and another 50 percent from sponsorship, in addition to grants, listener sponsorships, and other fundraising activities.¹² Additionally, the government has created a Community Radio Fund with 500,000 pounds per annum that stations can apply for. The fund is administered by a separate body created expressly for this purpose, including representatives from Ofcom, commercial broadcasters, and civil society.

In short, community radio (although late in coming) has been successfully established as a "third tier" of broadcasting, alongside public service and commercial media.

14.5.2.2. Hungary¹³

Non-profit radio was formally created in the 1996 Radio and Television Act in Hungary. The movement for community radio began shortly after the fall of the Iron Curtain (Gosztonyi, 2007). Under communist rule, only the then-state broadcaster, Magyar Radio, had the legal right to broadcast. After the political transformation, the newly elected government and newly formed political parties promised to create media laws that would open up broadcasting to new entrants. However, the change did not happen as quickly as promised, and some radio activists decided to take matters into their own hands. These new pirate radio stations took to the air with the hope of breathing new life into the radio waves while fighting for a democratic landscape through direct action (*ibid.*). The first of these stations, Tilos Rádió (Forbidden Radio) in Budapest, went on air in 1991; it was soon followed by others. The following year, an association was set up to organize efforts and push for inclusion of community-based media in the debates around new legislation (Hungarian Federation of Free Radios, or HFFR). In 1996,¹⁴ the community broadcasters succeeded: the long-awaited Media Act included a provision legally recognizing non-profit-oriented broadcasters, defined as “a broadcaster who/which agrees to serve national, ethnic or other minority goals, cultural aims or a disadvantaged group, or intends to serve as the public life forum of a community provided it uses the financial profit generated by the broadcasting, as recorded separately, solely for the maintenance and development of the broadcasting” (Act I of 1996, Article 2).

Under the Act, stations can broadcast up to three minutes of advertising in any given hour (as compared with twelve minutes for commercial and six minutes for public service radio) and are exempt from license or broadcasting fees. Significantly, the Hungarian legislation includes provisions for between half a percent to one percent of the annual revenues from the Broadcasting Fund¹⁵ to be allocated to support non-profit broadcasters. This generates approximately €500,000–1 million for the sector per annum. Individual stations are allowed to apply for these funds to support annual operating costs (including transmission costs); technical development and studio equipment costs; and the creation of news, sports or magazine-style programs. However,

stations are required to contribute from 15 to 50 percent in matching funds (self-financing) at the time of application, a figure prohibitively high for many stations. That, plus a demanding application process, has resulted in an estimated 15 to 25 percent of these funds going unallocated each year.¹⁶ To be eligible for a license application, stations should first achieve non-profit status, and no less than 50 percent of airtime must be committed to serving the specific community interests the station is seeking to serve (for example, at least half of the content on Roma station Radio C is in one of the Roma languages and/or consists of Gypsy music and cultural programming).

A significant limitation of the Hungarian legislation was the shortage of frequencies available for community-oriented stations. In 1997 the three best-known stations in Budapest shared a single frequency (*ibid.*). Subsequently, after the reallocation of non-profit frequencies from underperforming stations to primarily commercial operators, the number of community radios actually decreased for a time (*ibid.*). In 2002, however, changes to the legislation allowed for the licensing of small or low-power community radio stations. These stations are much narrower in reach. They are designed for small local communities such as villages, schools, neighborhoods, festivals, and hospitals, in areas where full power radio stations would be commercially unsustainable or frequencies unavailable. The application process was greatly simplified for these small-station applicants; approximately thirty to forty apply for such licenses each year, 60–70 percent of whom are approved (*ibid.*). Stations need only broadcast for a minimum of fourteen hours per week, and the overall design of the scheme reflects the local, community-driven value and mission of these small stations.

There are also concerns that the regulatory agency is interested in issuing licenses for small radio stations at the expense of developing opportunities for growth of the full-power non-profit sector. That sector remains somewhat stagnant at twelve non-profit radio stations (compared with forty-eight small radio stations granted licenses since 2004).

However, the future of community radio in Hungary also presents a number of threats. Concerns have been expressed regarding the lack of consideration for the future of community radio in plans for digital switchover. Despite the challenges, the Hungarian system of licensing and supporting non-profit radio remains the strongest in the region.

14.5.2.3. France

France has among the most local radio stations per capita in the world, including numerous community-oriented stations, the diversity and number of which testify to a balanced regulation that ensures variety in programming.¹⁷ There are an estimated 600 “associative” or community radio stations in France, many of which are Catholic radio stations, licensed under a framework for non-commercial radio.

What is most striking in the French legislation is the level of state support offered to associative radio stations. As in most European states, community stations are allowed to receive a percentage of their annual revenue from commercial advertising (capped at 20 percent in France). However, a substantial amount of funding is provided by the *Fond de soutien à l’expression radiophonique* (Support Fund for Radio Expression), created in 1982. The source of the Fund is a tax on advertising revenue of commercial broadcast media that is then redistributed to associative radio stations. Funds may be used to support start-up costs, equipment upgrades, and operational costs related to general overhead. Preference is given to stations with demonstrable training programs for station employees and volunteers. Other criteria include cultural and educational initiatives undertaken, collective program-making activities, total hours of local programming, measures to promote social integration and fight discrimination, and measures to promote environmental and local development issues. In 2004–2005, the Fund provided 676 grants averaging €35,000 each, for a total of €21 million in grants to community radio stations.

14.5.2.4. Netherlands

There are 296 community stations, or local public service broadcasters (“*lokale omroepen*”), in the Netherlands, with average yearly budgets of €40,000. These stations are represented by the *Organisatie van Lokale Omroepen in Nederland* (Olon), which is itself partially financed from the state’s national media budget. In 1997, local governments were granted authorization to introduce a local radio license fee. This was replaced in 2007 by a national license fee, of which €7.7 million will be distributed to community stations (or €1 per household) by

the Dutch Media Commission (Stevenson, 2006). Olon is active in efforts to increase the amount of funding and ensure debates around digital transition. In 1981, when Olon was created, there were only fifteen community stations. By 2008, almost all of the nearly 300 stations were members, and the organization has, at various times, between seven and ten full-time employees. Olon is recognized in Dutch media law as the representative body for the sector. There is an annual budget of €470,000: half is provided from the state's public service broadcasting budget, with the other half coming from member fees and third-party fees for services.

14.5.2.5. Ireland

The Broadcasting Commission of Ireland (BCI) supports a strong policy for community radio, viewing the sector as a distinct strand in Irish broadcasting, alongside commercial and public broadcasting.¹⁸

Irish community radio policy states that stations must be owned and operated by not-for-profit organizations, and that stations should provide for their membership, management, and operation by the community served. Under this model the station is accountable to the community, and the community is in control of, and therefore responsible for, the station.

Experience in Ireland has shown that while community broadcasting is viable, funding individual stations remains an ongoing challenge. Similar to the British policy, the BCI places a cap of 50 percent on any source of a station's income. A variety of funding approaches have been adopted that include membership fees, fee-for-services, community donations, general fund-raising and on-air commercial activity, and sponsorship. Although advertising has been difficult for some stations to secure, the BCI considers access to on-air commercial activity an essential funding source for community radio.

Among criteria the BCI must consider when reviewing applications are the quality, range, and type of programs proposed, particularly those in the Irish language; the opportunities the applicant will create for Irish talent in music, drama, and entertainment; the desirability of having diversity of services in the area specified; the desirability of allowing a person or group of persons control or a substantial interest in an undue number of sound broadcasting services and

communications media; and the extent to which the service proposed serves recognizable local communities and supports various interests in the community or serves communities of interest (BCI). Funding schemes include support for station evaluations such as listener surveys and audience studies, feedback, monitoring, Board of Director development, etc.

14.5.2.6. Germany and Belgium

The situation for community broadcasting in Belgium and Germany reflects the particularities of each country's decentralized regulatory regimes, which have resulted in very uneven developments of community media in both.

The Belgian media system is affected by the country's specific regional divisions that underlie political, ideological, and linguistic divides (Saeys and Coppens, 2007). The system serves as an example of complex regional negotiations hindering the development of independent community radio. The state broadcast monopoly was undermined by the introduction of local pirate radio stations in 1978–1979. Local independent broadcasting was introduced in 1981 and 1982 in the French and Flemish regions of Belgium, respectively. However, the local radio market was largely subsumed by commercially driven groups who eventually took over a majority of the “amateur” stations. The French Community's Decree on Radio Transmission in 2003 (“French Broadcasting Decree”) does not explicitly refer to community radio as a concept, nor to any particular provisions relating to the structure, funding, or operational rules of community broadcasters. This apparent lack of a community radio framework means that stations who wish to operate as a not-for-profit, community-oriented station are subject to the same rules governing commercial broadcasters. While some public funding is available to radio broadcasters through a grant from the Fonds d'aide à la Création Radiophonique (a public body created according to the 2003 Decree), its remit is very broad and seeks to promote innovative cultural radio programming in general terms without any explicit reference to the promotion of community radio as a sector.

The community radio sector in Germany—usually called “free radio”—has a long tradition, going back to the establishment of

Freiburg's Radio Dreyeckland in 1977 by anti-nuclear activists. However, as the authority for media policy in Germany lies with the *Länder*, i.e. the sixteen states, rather than the federal government, the policy environment is fragmented. Some regions recognize community media explicitly and even offer financial support. Others allow for free radio stations to be set up within established frameworks for local media. Still other regions (such as Berlin) are unsupportive or hostile towards non-commercial, self-organized citizens media.

Several regions have created forms of local non-commercial public access radio called "Open Channels." Open channels are administered and controlled by the regional radio authorities and allow limited forms of access for different groups in the area. In contrast to "free" radio stations, the degree of self-organization is limited, and thus the core characteristics of community media are compromised. Critics argue that open channels are controlled too heavily by the authorities.

14.5.2.7. Slovenia

Broadcasting policy in Slovenia has yet to recognize the importance of community media. Slovene media has recently been fraught with conflicts over (re)nationalization and commercialization (Planšak, 2008). Here the function of community media is performed primarily by student and ethnic radio stations: Radio Student in Ljubljana, Radio Mars in Maribor, and Radio Romc in Murska Sobota, broadcasting for the Roma community in Slovene and Roma languages. A review of broadcast licenses issued from 1995 to 2001 shows that the majority of new stations have been subsumed by larger radio networks and have lost much of their local sensibilities. This means that "too many frequencies were allocated, although the majority of small commercial radio stations can hardly survive unless they join some radio network. And, since the setting up of these networks is not based on any clear strategy and was not subjected to supervision or regulation, the whole sector is now in disarray" (Hrvatín and Kucić, 2004, p. 481). With changes in the media law since enacted, there are some limited provisions for non-profit media and subsidies for "special purpose programming" distributed through the license fee, and non-profit stations must broadcast and produce at least 30 percent of informative, artistic, educational, and cultural content. However, there remains no explicit

support for the development of community-based broadcasters, despite calls for greater media pluralism.

14.6. Future outlook—an enabling environment for community media

As case studies of state policies and European initiatives show, technological solutions for community media are only part of what is required for such media to flourish. Social needs must also be addressed in order for technological solutions to be meaningful, and sustainable environments are needed for community-driven media to develop. For community radio and (increasingly) television sectors to flourish, there must be enabling legislation—support for, and a mechanism of, licensing. Having a policy on paper does not mean much if there is not a supportive environment behind it. A survey of policies across Europe finds that best practices include recognition of community media as a formal “third sector”; criteria that ensure participatory, open, and community-driven stations emerge; mixed models of funding that include some form of ongoing and renewable government subsidy; flexibility that allows for communities to self-identify and define their own area of service coverage; recognition of the social gain and value community media can provide; and support for research, impact measurement, and audience studies to improve community service.

The necessary components for a supportive environment for community media relate broadly to greater societal needs for democratic media, including strong civil society, a basic constitutional and legal framework safeguarding freedom of expression and journalistic independence, and regulatory independence and transparency of decision-making in the overall policy process (Buckley et al. 2008). Regarding the legal environment, there must be fair and equitable principles guiding the distribution of frequencies among public, commercial, and community radio sectors; a portion of the radio spectrum reserved for not-for-profit broadcasting; affordable licensing fees; clarity and transparency in licensing processes; relevant but non-excessive eligibility requirements that emphasize responsiveness to the community being served (“social gain criteria”) and non-profit character (even with limited advertising revenue, station profits must be reinvested in

the station) (*ibid.*). Specifically, the licensing process itself should be fair, open, transparent, and clearly defined by law, with criteria developed in consultation with civil society (*ibid.*). Community broadcasting should be recognized in the law as a distinct type of broadcasting, and supported and encouraged through specific licensing arrangements that guarantee access to the radio spectrum and to economic resources that can foster sustainability.

Of particular concern is the transition to digital broadcasting. Though neither the European Union nor most Member States have regulations on switchover to digital for radio (with the exception of Hungary), there are decisions and debates taking place that do not yet adequately address the needs of community broadcasters. There is a growing knowledge gap related to broad questions about how the transition to digital audio provides both new opportunities and new challenges for community communication. Questions include: What will the new platforms for delivery be? Which will be the most suitable for community media uses? Which are the most cost-effective for small-scale, non-profit uses? What regulatory barriers need to be overcome? (Buckley, 2007). Opportunities in the digital transition include greater frequency availability, as more efficient uses of the spectrum offer new potential spaces on the radio dial—the so-called “digital dividend.” Changing technologies necessitate new policy regimes, which have often created space for new priorities and non-profit media. Thus the dialogue is being opened up regarding the relationship between public-interest obligations and needs and media regulations and policies.

The challenges that must be addressed include new gatekeepers in the form of digital multiplex operators without must-carry obligations for community media; fragmentation of competing digital systems and the lack of global standards; the fact that digital radio development is being driven by industry interests, not consumer needs; market-based spectrum allocation strategies such as spectrum auctions that privilege the highest bidder rather than the public interest; research oriented towards industry rather than public interest objectives and consequences; and the overall concern that digital audio services may address national and transnational needs, and therefore may not be the most efficient means of organizing local broadcasting (Buckley, 2007).

In short, it is unclear at present what the best digital platform for community media is. More research is needed on the subject, as well

as close consideration of different digital technologies (DAB, DRM, etc.) to “open spectrum” and “smart” or “cognitive radio.” At the same time, the analog present continues to be a crucial site for policy interventions and community media access, since it reflects where the vast majority of radio listeners are and will likely remain for the foreseeable future (ESF Report 2008). Community media advocates seek access to spectrum; must-carry obligations for new multiplex operators; means of sustainability—both financial and structural/organizational; a broad enabling environment within which to function; and more research and research funding that looks comparatively at policies, models of sustainability, and assessment of the impact of community media. Debates about the future of radio (whether digital or analog) must include the needs and interests of local communities and small-scale, not-for-profit media before a truly pluralistic media environment can flourish.

Not coincidentally, at a time when the Internet and other digital means of delivery address the problem of airwave scarcity, an increasing amount of grassroots pressure and regulatory progress has been made towards the development of analog, low-power community radio sectors around the globe. Globalization necessitates a simultaneous borderless sensibility and a “revitalization of the local” (Martin-Barbero, 1993). At the same time national and regional regulatory frames continue to be crucial sites for media policy intervention.

NOTES

¹ AMARC (2007) *Community Radio Social Impact Assessment: Removing Barriers, Increasing Effectiveness* (http://www.amarc.org/documents/books/AMARC_Evaluation_book_June-10_2007.pdf; retrieved September 1, 2008).

² European Parliament and the Council (2002) Directive 2002/20/EC on the authorization of electronic communications networks and services (Authorization Directive), O.J. 24.04.2002. L 108/21.

³ European Parliament and the Council (2002) Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), O.J. 24.04.2002. L 108/51.

⁴ The EU Commission has commissioned a study on media pluralism that is to be finalized in spring 2009 and that is to develop indicators on media pluralism.

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- ⁵ European Parliament (2004) *Resolution on the Risks of Violation, in the EU and Especially in Italy, of Freedom of Expression and Information*. O.J. C 104 E, 30.4.2004, p. 1026.
- ⁶ European Commission (1995) *Communication from the Commission on Racism, Xenophobia and Anti-Semitism. Proposal for a Council Decision Designating 1997 as European Year against Racism*. COM (95) 653 final. More detailed references to relevant EU policies can be found in European Parliament, Directorate General Internal Policies of the Union (2007).
- ⁷ See Recommendation 173 (2005) on regional media and transfrontier co-operation by the congress of regional and local authorities in the Council of Europe; and Recommendation Rec (2007)2 of the Committee of Ministers to Member States on media pluralism and diversity of media content.
- ⁸ The project Europaradio, organized by the German community radio Corax and funded by the EU, constituted a practical example for this dialogue in 2006–2007.
- ⁹ Kleinsteuber, H. (2005) *Community Radio in Germany*, available online at http://www.iren-info.org/fileadmin/dokumente/Community_Radio_in_Germany.pdf; retrieved September 1, 2008.
- ¹⁰ For more on London community radio, see Coyer (2005) and Coyer, Dowmunt, and Fountain (2007). For a detailed history of the development of community radio in the United Kingdom, see Lewis and Booth (1989) and Coyer (2005).
- ¹¹ Ofcom (2004a) *The Licensing Process* (http://www.ofcom.org.uk/radio/ifi/rl/commun_radio/#content; retrieved September 2, 2008); Ofcom (2004b) *Licensing Community Radio* (http://www.ofcom.org.uk/radio/ifi/rl/commun_radio/#content; retrieved September 2, 2008).
- ¹² Controversially, separate restrictions on advertising apply to community stations located in areas with populations below 50,000 people where there also exists a local commercial radio station (Independent Local Radio).
- ¹³ This section was compiled primarily from Gosztanyi (2007) plus source material, documentation, and interviews.
- ¹⁴ This follows the so-called "Media Wars" in Hungary, during which political parties lobbied for control of the public broadcasting stations (Gosztanyi, 2007).
- ¹⁵ The Fund is created by law and funded by government subsidy to support public service broadcasting, non-profit broadcasting, and cultural broadcasting that is administered by the National Radio and Television Board (ORTT).
- ¹⁶ These figures are based on calculations published by Gosztanyi (2007).
- ¹⁷ Available at <http://www.csa.fr/multi/independant/independant.php?l=uk>; retrieved September 1, 2008.
- ¹⁸ More detailed information available at <http://www.bci.ir>; retrieved September 2, 2008.

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The COST A30 Action “*East of West: Setting a New Central and Eastern European Media Research Agenda*” is a 4 year long (2005–2009) COST research project that has established an outstanding network, bringing together approximately 70 distinguished media and communications researchers from 27 countries in Western and Eastern Europe. The main objective of the Action is to increase the knowledge concerning media production, media reception and use, and the political implications of the transformation of the media landscape in the Eastern and Central European context. The Action aims at organizing a European social science research network with a clear focus on emerging problems of Central and Eastern European media in a comparative perspective. The Action is also building a network of media studies and communication research centers, higher education programs and departments in Western and Eastern Europe.
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The book addresses a critical analysis of major media policies in the European Union and the Council of Europe at the period of profound changes affecting both media environments and use, as well as the logic of media policy making and reconfiguration of traditional regulatory models. The analytical problem-related approach explores three problem areas: freedom of expression as a regulatory rationale, AVMS Directive and content-related regulation, and media pluralism and structural regulation. This volume offers a perspective of both “new” and “old” EU Member States on a media policy process seen as an integral part of a European communication space formation and exercise of communication rights.

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